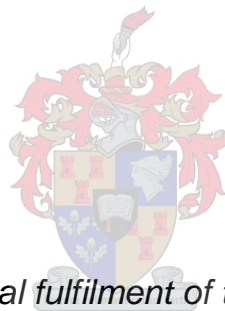


# **Compensation for excessive but otherwise lawful regulatory state action**

by

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# Declaration

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## Summary

Section 25 of the South African Constitution authorises and sets the limits for two forms of legitimate regulatory interference with property, namely deprivation and expropriation. The focus of this dissertation is on the requirement in section 25(1) that no law may authorise arbitrary deprivation of property. According to the Constitutional Court, deprivation is arbitrary when there is insufficient reason for it. The Court listed a number of factors to consider in determining whether there is a sufficient relationship between the purpose to be achieved by deprivation and the regulatory method chosen to achieve it.

The outcome of the arbitrariness question depends on the level of scrutiny applied in a particular case. The level of scrutiny ranges from rationality review to proportionality review. Deprivation that results in an excessively harsh regulatory burden for one or a small group of property owners will probably be substantively arbitrary and in conflict with section 25(1). Courts generally declare unconstitutional regulatory interferences with property rights invalid. However, invalidating legitimate regulatory measures that are otherwise lawful purely because they impose a harsh and excessive burden on some property owners may not always be justified if the regulatory measure fulfils an important regulatory purpose. Invalidating excessive regulatory measures may in some instances also be meaningless and may not constitute appropriate relief in vindicating the affected rights.

The purpose of this dissertation is to investigate the appropriateness of alternative solutions to invalidating otherwise lawful and legitimate but excessive regulatory deprivations of property. The goal is to identify remedies that allow courts to uphold the regulatory measure and simultaneously balance out the excessive regulatory burden it imposes on property owners.

One alternative solution is to transform the excessive regulatory measure into expropriation and require the state to pay compensation to the affected owner. This approach is referred to as constructive expropriation. However, in view of the Constitutional Court's approach to and the wording of section 25 it seems unlikely that it will adopt constructive expropriation as a solution.

Another alternative solution is for the legislature to include a statutory provision for compensation in the authorising statute. Examples from German, French, Dutch and Belgian law show that this approach balances out the excessive regulatory burden and allows courts to uphold the otherwise lawful and legitimate but excessive regulatory statute without judicially transforming the deprivation into expropriation. An overview of South African law indicates that there is legislation that includes non-expropriatory compensation provisions. In cases where the regulatory statute does not contain a compensation provision, the courts might consider reading such a duty to pay compensation into the legislation or awarding constitutional damages.

In conclusion, it is possible for the state to deprive owners of property in a manner that may result in an excessive regulatory burden being suffered by one or a small group of property owners if the regulatory purpose is necessary in the public interest, provided that the legislature explicitly or implicitly provides for non-expropriatory compensation in the regulatory statute.

## Opsomming

Artikel 25 van die Suid Afrikaanse Grondwet magtig en stel grense daar vir twee regmatige vorme van regulerende staatsinmenging met eiendom, naamlik ontneming en onteiening. Die fokus van hierdie proefskrif is op die vereiste in artikel 25(1) dat geen wet arbitrêre ontneming van eiendom mag toelaat nie. Volgens die Grondwetlike Hof is 'n ontneming arbitrêr as daar nie 'n voldoende rede daarvoor is nie. Die Hof het faktore gelys wat oorweeg moet word om te bepaal of daar 'n voldoende verhouding bestaan tussen die doel wat die staat met ontneming van eiendom nastreef en die regulerende maatregel wat vir die doel gebruik word.

Die uitkoms van die toets vir arbitrêre ontneming hang af van die hersieningsstandaard wat die hof in 'n spesifieke geval gebruik. Die standaard wissel van 'n redelikheidstoets tot 'n proporsionaliteitstoets. 'n Ontneming wat 'n oormatige swaar las op een of 'n beperkte groep eienaars plaas sal waarskynlik arbitrêr en teenstrydig met artikel 25(1) wees. Die hof se benadering is om ongrondwetlike ontnemings van eiendom ongeldig te verklaar, maar dit is nie altyd geregverdig om toelaatbare en andersins regmatige ontnemings wat 'n oormatige las op sommige eienaars plaas ongeldig te verklaar nie. Die ongeldigverklaring van wetgewing wat 'n oormatige ontneming magtig mag soms ook nutteloos wees en nie 'n gepaste remedie wees om die eienaar se regte te herstel nie.

Die doel van hierdie proefskrif is om die geskiktheid van alternatiewe oplossings tot die ongeldigverklaring van andersins regmatige maar oormatige ontnemings van eiendom te ondersoek. Die doel is om remedies te identifiseer wat die hof toelaat om regulerende ontnemings in stand te hou en terselfdertyd die oormatige las op enkele eienaars uit te balanseer.

Een alternatiewe oplossing is om die oormatige ontneming te omskep in onteiening en die staat sodoende te verplig om aan die eienaar vergoeding te betaal. Hierdie benadering staan bekend as konstruktiewe onteiening. Gegewe die Grondwetlike Hof se benadering tot en die bewoording van artikel 25 is dit onwaarskynlik dat die hof konstruktiewe ontneming as 'n oplossing sal aanvaar.

'n Ander alternatiewe oplossing is vir die wetgewer om 'n statutêre bepaling vir vergoeding in die magtigende wetgewing in te voeg. Voorbeelde uit die Duitse, Franse, Nederlandse en Belgiese reg toon aan dat hierdie benadering 'n oormatige las kan uitbalanseer en die hof toelaat om die andersins geldige en regmatige ontneming in stand te hou sonder om dit in onteiening te omskep. 'n Oorsig van Suid Afrikaanse reg dui aan dat daar wetgewing bestaan wat wel voorsiening maak vir sodanige vergoeding. In gevalle waar die magtigende wetgewing nie vergoeding voorsien nie kan die hof oorweeg om 'n vergoedingsplig in die wet in te lees of om grondwetlike vergoeding toe te ken.

Hierdie proefskrif kom tot die gevolgtrekking dat dit grondwetlik moontlik is vir die staat om eienaars van eiendom te ontnem op 'n wyse wat soms daartoe kan lei dat enkele eienaars 'n oormatige swaar las moet dra, mits die ontneming 'n belangrike openbare doel dien en die wetgewer uitdruklik of implisiet voorsiening maak vir vergoeding.

# Acknowledgements

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# Chapter 1

## Introduction

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# 1 Introduction: Arbitrary deprivation of property

Section 25 of the South African Constitution authorises two forms of state interference with property, namely deprivation and expropriation.<sup>1</sup> Section 25(1) provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. Section 25(2) and 25(3) set out the requirements for valid expropriation of property. Property may only be expropriated in terms of law of general application, for a public purpose or in the public interest and subject to just and equitable compensation. Compensation is generally not required for deprivation of property. However, the absence of a clear-cut distinction between deprivation and expropriation creates uncertainty regarding the extent to which someone may legitimately be deprived of property without compensation. The question arises whether deprivation can shade into expropriation of property that would require compensation, specifically in instances where the regulatory burden that results from the exercise of the police power is so significant that it seems unfair not to compensate the affected property owner. To answer this question one must first understand what is meant by deprivation of property in terms of section 25(1) and what the implications and consequences are when a particular deprivation does not comply with the requirements in section 25(1).

*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>2</sup> (FNB) is the most comprehensive judicial authority to date on the interpretation, structure and application of section 25.<sup>3</sup> The Constitutional Court introduced a

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> 2002 (4) SA 768 (CC).

<sup>3</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 8, 193; H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 242; H Mostert

methodology for the interpretation of section 25 to determine whether the relevant provision in that case constituted an arbitrary deprivation of property.

In terms of the *FNB* methodology the following questions need to be considered.<sup>4</sup> Firstly, it must be established whether the affected interest qualifies as property for purposes of section 25.<sup>5</sup> If the affected interest amounts to property, the second question is whether there has been a deprivation of such property. If there is

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“Trends in the South African Constitutional Court’s jurisprudence on property protection and regulation” 2007 *Amicus Curiae* 2-8 at 3; T Roux & D Davis “Property” in H Cheadle; D Davis & N Haysom (eds) *South African constitutional law: The bill of rights* (2<sup>nd</sup> ed Issue 15 2013) chap 20 at 20-6; T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 10. The courts in *Haffeejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC) para 25 and *Opperman v Boonzaaier and Others* [2012] ZAWCHC 27 (17 April 2012) para 19 stated that *FNB* is the starting point in the interpreting and application of section 25. It is important to note that the *FNB* decision only dealt with section 25(1)-(3) of the Constitution, which can be described as the protective function of the property clause. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 12 explains that section 25 is a combination of two seemingly contradictory functions. Section 25(1)-(3) protects existing property interests against unconstitutional interference, and section 25(4)-(9) provides authority for state action aimed at the promotion of land and other related reforms.

<sup>4</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

<sup>5</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 111 states that this is considered to be the “threshold question” for entry into the realm of constitutional property protection. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51 the Constitutional Court held that “it is practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25”. In *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 83 the Constitutional Court considered the meaning of property under section 25 to be a “vexed question”. Although section 25 does not contain a comprehensive definition of property, section 25(4)(b) provides that property is not limited to land. This indicates that both corporeal and incorporeal property enjoy protection. H Mostert & PJ Badenhorst “Property and the bill of rights” in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (Issue 18 2006) 3FB-20 state that the judiciary is generally responsible for defining the constitutional content and scope of property. According to T Allen “Commonwealth constitutions and the right not to be deprived of property” (1993) 42 *International & Comparative Law Quarterly* 523-552 at 527, most Commonwealth constitutions do not define “property” and leave it to the judiciary to decide what property means. Furthermore, where property is defined, it is done in an inclusive manner which entrusts the judiciary to determine the scope of its application. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 84, 283-284 states that the “property” stage of the arbitrariness test is relatively unproblematic since the Constitutional Court tends to attach a generously wide interpretation to the property concept, whilst scrutinising the justification for the infringement more closely. According to Van der Walt, the courts’ generous approach to the property question is in line with other jurisdictions. Moreover, by focusing on one issue provides the easiest or least controversial solution to what may otherwise be a complicated or contested issue. See also I Currie & J De Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 535-537; T Roux & D Davis “Property” in H Cheadle; D Davis & N Haysom (eds) *South African constitutional law: The bill of rights* (2<sup>nd</sup> ed Issue 15 2013) chap 20 at 10-18(1); PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 531; T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 10; IM Rautenbach “Die reg op eiendom – Arbitrêre ontneming, proporsionaliteit en die algemene beperkingsbepaling in konteks” 2002 *Tydskrif vir die Suid Afrikaanse Reg* 813-822 at 813.

proof of a deprivation, the third question is whether such deprivation is consistent with section 25(1). Section 25(1) requires deprivations to be authorised by law of general application and provides that no law may effect arbitrary deprivation. If the deprivation is inconsistent with section 25(1), and therefore arbitrary, the fourth question is whether such deprivation can be justified under section 36. If the deprivation is not authorised by law of general application or if the deprivation is arbitrary and cannot be justified under section 36 it will be the end of the matter.<sup>6</sup> However, if the deprivation is not arbitrary or if it is but can be justified under section 36, the fifth question is whether the deprivation amounts to expropriation for purposes of section 25(2). If the deprivation amounts to expropriation, the sixth question is whether the expropriation complies with the requirements of section 25(2)(a) and (b). However, if the expropriation does not comply with the said requirements, the last question is whether the expropriation can be justified under section 36.<sup>7</sup> Moreover, if the deprivation amounts to expropriation, which is in conflict with section 25(2) or 25(3) but can be justified under section 36(1), it is valid.

This study is concerned with those regulatory deprivations that do not fall squarely within the category of constitutionally valid deprivation of property but do not constitute formal expropriation either. The cases in question are regulatory in form and purpose to the extent that they involve state interferences with private property that are authorised as and meant to function as regulatory deprivations and not as expropriations of property, but as regulatory deprivations they are excessive, even when they are properly authorised and otherwise valid and lawful, to the extent that

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<sup>6</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 58.

<sup>7</sup> F Michelman "Against regulatory taking: In defense of the two-stage inquiry: A reply to Theunis Roux" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 283-302 at 302 comments that this two-stage inquiry adopted by the Court is a "loud and clear token of the shift from a culture of authority to a culture of justification".

their effects are excessively harmful (either in the extent to which they affect the property owner detrimentally or in that they single out one or a small number of owners). Therefore, the focus is specifically on excessive but otherwise valid and important regulatory deprivations of property. The aim of this study is, for cases of this nature, to identify the kind and level of scrutiny the courts apply to determine the extent of lawful regulatory deprivation of property and the consequences of regulatory infringements that meet the requirements of section 25(1) but nevertheless appear to have excessively harmful effects. The problem is that the courts might sometimes be hesitant to declare deprivations of this nature invalid simply because of their effects, both because they are otherwise lawful and because they might serve a valid and important regulatory purpose. One possibility is to treat excessive regulatory deprivations (hereafter excessive regulatory measures) as instances of expropriation, the idea being that payment of compensation might balance out the excessive harm they cause. This possibility is discussed in chapter 2. South African courts seem reluctant to follow this approach, also known as “constructive expropriation”. However, there are other alternative approaches that do not involve treating these excessive regulatory measures as expropriation. These alternative approaches are discussed in chapter 3 and chapter 4.

For purposes of this chapter the main focus is on the courts’ approach to determining whether the relevant infringement constitutes deprivation for purposes of section 25(1); whether the deprivation meets the requirements of section 25(1); and if not, whether it can be justified in terms of section 36(1). The courts’ analysis of expropriation will be discussed only in so far it relates to the analysis of regulatory deprivation of property.

## 2 Deprivation

### 2.1 *Defining what constitutes deprivation of property*

Section 25(1), which authorises deprivation of property, fulfils two functions.<sup>8</sup> Firstly, it authorises the state to legitimately (for valid regulatory purposes) interfere with and limit the use, enjoyment and exploitation of property in accordance with the requirements in section 25(1). This is also known as the police power principle.<sup>9</sup> Secondly, the validity requirements contained in section 25(1) ensure that regulatory limitations on property rights are not arbitrary or unfair.

Van der Walt states that the decision in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another*<sup>10</sup> (*Reflect All*) explicitly confirms the police power principle in South African law.<sup>11</sup> Sax states that the term “police power” has no exact definition.<sup>12</sup> However, the term is used to describe those state actions that limit the use, enjoyment and exploitation of property for the purpose of promoting and protecting public health and

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<sup>8</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 17.

<sup>9</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213; AJ van der Walt *Property and constitution* (2012) 29.

<sup>10</sup> 2009 (6) SA 391 (CC) para 33.

<sup>11</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 215. In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 33 Nkabinde J held that property rights “are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes. Whilst the exploitation of property remains an important incident of landownership, the state may regulate the use of private property in order to protect public welfare” (footnotes omitted).

<sup>12</sup> JL Sax “Takings and the police power” (1964) 74 *Yale Law Journal* 36-76 at 36 fn 6.

safety.<sup>13</sup> Moreover, the state may also exercise the police power to regulate and protect conflicting private property interests.<sup>14</sup>

Regulatory deprivations of property can take on various forms, including land-use planning, building regulations, rent control, historic monument preservation, regulation of eviction procedures, mandatory licensing, various fiscal measures, environmental conservation, and forfeiture of property. Furthermore, deprivation is usually effected through or in terms of legislation or other law.<sup>15</sup> State exercise of the regulatory police power almost always brings about a loss for the affected property holder, at least to the extent that her use of the property is restricted in some way, but compensation is as a rule not required for deprivation. The general scope of the impact of regulatory deprivations is one justification for the absence of compensation. Deprivation generally affects all property holders more or less equally and it often benefits them reciprocally.<sup>16</sup> Furthermore, it would be impossible for the state to promote and protect the public interest by way of regulatory limitations on the use of property if it had to compensate every affected property holder.<sup>17</sup> However, the state does not have unlimited power to limit property rights. The Constitution sets out the

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<sup>13</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213-214; AJ van der Walt *Property and constitution* (2012) 29; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 544.

<sup>14</sup> JW Singer "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335 at 1296-1297 states that property is a system and not just an individual entitlement. Property rights and externalities are inevitably bound and therefore, because property rights necessarily affect others, they must be regulated to ensure that they are compatible with the property rights and personal rights of others. JL Sax "Takings and the police power" (1964) 74 *Yale Law Journal* 36-76 at 62-63 states that the regulatory impact on the individual property owners is the same irrespective whether the state is acting in its core police power capacity or in its role as mediator between conflicting private interests.

<sup>15</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 213.

<sup>16</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 214.

<sup>17</sup> Nkabinde J in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 67 held that "[f]orward planning and good governance ... would become impossible if the State had to pay compensation every time it proposed a project in the public interest". See also *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) para 413 in which the US Supreme Court held that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law".



perimeters within which the state may legitimately limit property rights. The constitutional protection of property by way of limiting the state's police power differs in the various jurisdictions that are discussed in the following chapters.

With regard to South African law, section 25(1) provides that the state may only limit property rights in terms of law of general application. A regulatory measure that is not authorised by law of general application is invalid and cannot be salvaged. Deprivations of that kind are not considered here. Furthermore, no law may permit arbitrary deprivation of property. Before one can consider whether a regulatory limitation is arbitrary, as set out in the *FNB* decision, it first has to be established whether the limitation is a deprivation for purposes of section 25(1).

Although the definition of deprivation seems more or less settled the Constitutional Court has not always understood and applied the term "deprivation" uniformly. In the *FNB* decision the Court attached a wide interpretation to the term "deprivation", stating that "any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned".<sup>18</sup> However, in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others*<sup>19</sup> (*Mkontwana*), the Court defined deprivation more narrowly than it did in *FNB* when it held that

"[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation ... at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use

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<sup>18</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>19</sup> 2005 (1) SA 530 (CC).



or enjoyment found in an open and democratic society would amount to deprivation”.<sup>20</sup>

Subsequent to the *Mkontwana* decision, in *Reflect-All* the Constitutional Court referred to both the *FNB* and the *Mkontwana* interpretations of deprivation.<sup>21</sup> The Court found that the relevant regulatory provision that places an embargo on the transfer of property deprived the property owners of some aspect of the use, enjoyment and exploitation of their properties.<sup>22</sup> According to Van der Walt, the Court’s finding is an indication that it followed the wider *FNB* rather than the narrower *Mkontwana* approach in terms of the interpretation of deprivation.<sup>23</sup>

However, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>24</sup> (*Offit*) the Constitutional Court created confusion when it referred to the *FNB* interpretation but then seemed to follow the definition in *Mkontwana*. It stated that “there must at least be ‘substantial interference’ in order to warrant consideration by this court in this matter of whether there has been an unconstitutional infringement of s[ection] 25(1).”<sup>25</sup> However, Van der Walt points out that although the Court cited the *Mkontwana* definition of deprivation, it in fact applied the *FNB* definition.<sup>26</sup> In *Offit*, the Court’s focus was on distinguishing between significant and insignificant deprivation, rather than between “normal” deprivation and

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<sup>20</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 32.

<sup>21</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 35.

<sup>22</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 38.

<sup>23</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 207, 258. See also J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 217.

<sup>24</sup> 2011 (1) SA 293 (CC).

<sup>25</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 39.

<sup>26</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 207.

deprivation that exceeds what is normal in an open and democratic society, which formed the core of the *Mkontwana* definition.

Van der Walt criticises the additional qualification “normal in an open and democratic society” that the Court added to the definition of deprivation in the *Mkontwana* decision.<sup>27</sup> According to Van der Walt, the addition of the phrase “normal in an open and open and democratic society” is an overstatement since all valid regulatory restrictions on the use and enjoyment of property are normal in such a society.<sup>28</sup> It is not necessary to use section 25(1) to strike down undemocratic, illegitimate regulatory state action, since more suitable mechanisms are provided for that purpose in the Constitution.<sup>29</sup> Furthermore, limiting the section 25(1) enquiry to “substantial or abnormal” restrictions serves no useful purpose and could unleash an unnecessary interpretative struggle to determine whether a restriction is substantial enough to qualify as deprivation.<sup>30</sup> Moreover, in *Mkontwana* O’Regan J in a minority judgment held that it would defeat the purpose of section 25(1) if deprivation were to be read narrowly.<sup>31</sup> The extent of the deprivation and the effect on the property

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<sup>27</sup> AJ van der Walt “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 79.

<sup>28</sup> AJ van der Walt “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 80 questions whether the insertion of the particular phrase might have been an early indication that the Court was going to hand down a “government-friendly judgment” in this case.

<sup>29</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 205 states that the rule of law principle, the equality provision (section 9) and the just administrative action guarantee (section 33) in the Constitution are more commonly used mechanisms to review and declare undemocratic, illegitimate state action unconstitutional.

<sup>30</sup> AJ van der Walt “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 80. See also I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 541.

<sup>31</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 89.

holder are two of the considerations to determine whether deprivation is arbitrary.<sup>32</sup> Section 25(1) is not only aimed at preventing excessive regulatory deprivation but also to control that normal regulatory deprivation is generally properly authorised.<sup>33</sup> Therefore, to restrict deprivation to extremely harsh or serious interferences with property would not make much sense.<sup>34</sup> A wider interpretation of deprivation is justified when regarding the purpose of section 25(1), the legality requirement, and the fact that deprivation is normally not compensated.<sup>35</sup> If section 25(1) was restricted to “interference or limitation that goes beyond the normal restrictions”, it would lead to undemocratic consequences because the majority of state actions would be excluded from judicial and constitutional review merely because they appear “normal” on face value.<sup>36</sup>

Furthermore, in *Offit* the Court may have interpreted the *Mkontwana* definition of deprivation simply to mean that the limitations placed on property rights must be significant, in the sense of something more than *de minimis*, for them to qualify as deprivation in terms of section 25(1).<sup>37</sup> The Court indicated in both *Reflect-All* and *Offit* that regulatory state action must at least have a legally significant impact on the property holder in the sense of having made a legally relevant impact, before it would be eligible to be considered deprivation under section 25(1).<sup>38</sup> According to Van der

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<sup>32</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 90.

<sup>33</sup> AJ van der Walt “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 80.

<sup>34</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 205.

<sup>35</sup> AJ van der Walt “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 80.

<sup>36</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 206.

<sup>37</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 264.

<sup>38</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209.

Walt, the *Offit* decision would not have been decided differently if the *FNB* definition had been used, since *FNB* also indicated that only legally significant restrictions on property rights would be considered deprivation in terms of section 25(1).<sup>39</sup> Therefore, the simplest solution is to adhere to the *FNB* definition of deprivation, subject to the *de minimis* principle; and to accept that the scope of the deprivation is only relevant in so far it might affect the level of judicial scrutiny concerning whether the deprivation complies with the requirements of section 25(1).<sup>40</sup>

## 2 2 Requirements for valid deprivation of property

### 2 2 1 Introduction

Once it is established that the interest claimed to be infringed is property for purposes of section 25 and that there is a deprivation of such property, the court needs to consider whether the deprivation complies with the requirements of section 25(1).<sup>41</sup> Section 25 confirms that property rights are not absolute and may be subject to limitation by the state for public purposes. However, the state's power in this regard is not unlimited. Section 25(1) contains two explicit requirements for a valid deprivation of property, namely that the deprivation must be authorised by law of general application and that no law may authorise arbitrary deprivation of property. Moreover, another implicit requirement is that the deprivation must be for a public purpose. If these requirements are not met, the deprivation will be unconstitutional and invalid unless it can be justified under section 36.

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<sup>39</sup> AJ van der Walt "Constitutional property law" 2010 (4) *Juta's Quarterly Review* at 2.2.1; AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209, 264.

<sup>40</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209.

<sup>41</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

## 2 2 2 Law of general application

Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The first requirement in terms of section 25(1) is therefore that the state action must be authorised by law of general application. Courts interpret the term “law” generously.<sup>42</sup> Both original and delegated legislation<sup>43</sup> as well as the common law<sup>44</sup> and customary law<sup>45</sup> are regarded as law of general application.

Significantly, if the state action which results in deprivation of property is not authorised by law, such state action is invalid. That will be the end of the matter.<sup>46</sup> Van der Walt states that the “law of general application” requirement in section 25(1) ensures that the constitutionally recognised sources of law comply with specified constitutional requirements if they limit constitutional rights.<sup>47</sup> This dissertation does not deal with deprivation of property that is invalid because it is not authorised by law of general application.

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<sup>42</sup> I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 169. Section 2 of the Interpretation Act 33 of 1957 defines law as “any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law.”

<sup>43</sup> I Currie & J de Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 156, 540; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 545.

<sup>44</sup> I Currie & J de Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 156; MD Southwood *The compulsory acquisition of rights by expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 16; AJ van der Walt *Property and constitution* (2012) 25. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234 points out that neighbour law is an example of common law that could deprive a property holder of property for a regulatory purpose. See also *Thebus and Another v S* 2003 (6) SA 505 (CC) para 65; *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) paras 44, 136.

<sup>45</sup> I Currie & J de Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 156; AJ van der Walt *Property and constitution* (2012) 14, 25-26; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 545.

<sup>46</sup> T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 4.

<sup>47</sup> AJ van der Walt *Property and constitution* (2012) 28.

### 2 2 3 Public purpose

Section 25(1) does not explicitly state that deprivation of property must be for a public purpose. However, Van der Walt argues that the state's regulatory power to impose limitations on the use of property by way of deprivation is subject to an implicit public purpose requirement.<sup>48</sup> The public purpose requirement can be inferred from either the law of general application or the non-arbitrariness requirement.<sup>49</sup> According to Van der Walt, the non-arbitrariness requirement in section 25(1), together with the arbitrariness test set out in *FNB*, enables the recognition of a public purpose requirement because the "proscription of arbitrary deprivation is intended to ensure that deprivation of property is imposed with due regard for proportionality between *the public interest served by regulation* and the private interests affected by it".<sup>50</sup> Furthermore, the traditional function of regulatory deprivation, namely limiting the use and enjoyment of property to protect and promote health and safety and other legitimate public interests, also facilitates the recognition of a public purpose requirement because action that promotes public health and safety will no doubt serve a public purpose.<sup>51</sup> It is unclear whether the implicit public purpose requirement for deprivation would require a different level of scrutiny than the explicit public purpose or public interest requirement for expropriation.<sup>52</sup> In most instances the two

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<sup>48</sup> AJ van der Walt *Property and constitution* (2012) 29.

<sup>49</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 228.

<sup>50</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 228. T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 23 states that the courts in the application of the arbitrariness test "will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in, or the public interest underlying, the law in question".

<sup>51</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 227, 228.

<sup>52</sup> See BV Slade "'Public purpose or public interest' and third party transfers" (2014) 17 *Potchefstroom Electronic Law Journal* 166-206 for a discussion on the distinction between public purpose and public interest in the context of expropriation (section 25(2)).



tests will coincide. This dissertation does not deal with deprivation of property that is unconstitutional because it does not serve a legitimate public purpose.

#### **2 2 4 No one may be deprived of property arbitrarily<sup>53</sup>**

Once the first requirement, namely law of general application that authorises deprivation of property is complied with, the second requirement provides that no law may authorise arbitrary deprivation of property. In *FNB* the Court embarked on a comparative analysis of foreign law in an attempt to determine the meaning of the word “arbitrary” in section 25(1). The Court held that the word “arbitrary” should be interpreted in the context of section 25, the Constitution as a whole and the historical context of property in South Africa.<sup>54</sup> The Court stated that the non-arbitrariness requirement in section 25 requires something more than mere rationality analysis but less strict than a full-scale proportionality evaluation under section 36.<sup>55</sup>

The Court attached substantive content to the word “arbitrary” and concluded that “deprivation of property is ‘arbitrary’ as meant by section 25 when the ‘law’

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<sup>53</sup> The *FNB* methodology provides for two forms of arbitrary deprivation, namely substantive arbitrariness and procedural arbitrariness. However, for purposes of this dissertation only substantive arbitrariness is considered and discussed. Excessive regulatory measures will generally constitute substantive arbitrary deprivation of property. The various approaches evaluated in this study all concern the payment of compensation, albeit on different legal bases, to reduce the burden that results from the regulation and thereby prevent it from being arbitrary. However, procedurally arbitrary deprivation can never be rectified by the payment of compensation. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also AJ van der Walt “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94; AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 264-270; I Currie & J de Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 540-542; T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 25-26 for a discussion on procedural fairness.

<sup>54</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 63-66.

<sup>55</sup> In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 99 the Constitutional Court held that “[t]his is so because the standard set in section 36 is ‘reasonableness’ and ‘justifiability’, whilst the standard set in section 25 is ‘arbitrariness’”.

referred to in section 25(1) does not provide sufficient reason for the particular deprivation”.<sup>56</sup> Sufficient reason is to be determined by evaluating the relationship between the means employed and the ends sought to be achieved. This requires a complexity of relationships to be considered, namely the relationship between the purpose for the deprivation and the person whose property is affected; the relationship between the deprivation and the nature of the property; and the extent of the deprivation.<sup>57</sup> The applicable level of scrutiny is dependent on the purpose sought to be achieved by the deprivation and the nature and extent of the property affected. When ownership of land is affected, a more compelling purpose is required to establish sufficient reason.<sup>58</sup> Furthermore, when the deprivation embraces all the incidents of ownership the purpose of the deprivation will also have to be more compelling than in cases where only some incidents are affected or when certain incidents are only partially affected.<sup>59</sup>

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<sup>56</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; AJ van der Walt “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 78.

<sup>57</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>58</sup> In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 54, 56 the Constitutional Court held that factors such as the subjective interest of the owner in the object, the economic value of the right, or the fact that the owner makes no or limited use of the object in question play no role in the characterisation of the right. However, these factors may be relevant in deciding whether deprivation is arbitrary.

<sup>59</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. According to T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 272-273, the factors listed in para 100 of *FNB* indicate that judicial review is determined according to the nature of the property right affected by the regulatory scheme. This approach is similar to that followed in the German Federal Constitutional Court’s differentiated protection of property interests according to their social function. Roux contrasts this with the approach followed in the Commonwealth, where a uniform standard of review is generally applied once it is determined that the claimant’s interest amounts to constitutional property. In the Commonwealth, the nature of the property as well as the number of incidents of ownership affected by the regulatory scheme is only relevant to the threshold question.



## 2 2 5 Different levels of judicial scrutiny

The arbitrariness test is in essence an exercise in balancing various interests, where the meaning of non-arbitrariness fluctuates according to the level of judicial scrutiny.<sup>60</sup> According to Roux, the factors listed by the Court to determine “sufficient reason” is an indication that constitutional property cases will be decided on varying levels of judicial scrutiny, depending on the seriousness of the deprivation and the impact it has on the claimant. The state’s “justificatory burden” will be greater the more drastic the deprivation and the more extensive its impact.<sup>61</sup> There may be circumstances when sufficient reason is established by no more than a rational relationship between means and ends. In others, sufficient reason may only be established by a proportionality evaluation that comes closer to (but never quite reaches) the level of scrutiny required by a full-scale limitation analysis in terms of section 36(1).<sup>62</sup> This variable approach is beneficial because, on the one hand, it enables the courts to show the necessary deference when reviewing the impact on property rights of public health and safety regulations and important social programmes, such as land reform; while on the other hand, in cases where the state overzealously regulates property in pursuit of less compelling goals, it allows the courts to apply a higher level of scrutiny to provide adequate protection.<sup>63</sup>

Roux states that the scrutiny of deprivation may not always be as “thick” as it was in *FNB* due to the fact that the *FNB* approach “leaves much scope for judicial

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<sup>60</sup> PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 529; H Mostert & PJ Badenhorst “Property and the bill of rights” in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (Issue 18 2006) 3FB-17.

<sup>61</sup> T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 273.

<sup>62</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>63</sup> T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 274.

discretion”, whereby courts may adjust the level of scrutiny of the enquiry according to the facts of the particular case and the factors to be taken in account.<sup>64</sup> The outcome of a case will largely be determined by the level of scrutiny that the court decides to apply. Roux’s prediction was proven correct in the *Mkontwana* decision.<sup>65</sup> According to Roux, the grounds for the application of the one or the other level of judicial scrutiny should be clear and ascertainable in advance.<sup>66</sup>

Apart from the varying level of scrutiny, Roux criticises the Court’s approach in *FNB* for creating a “vortex” whereby issues that may have been addressed at other stages of the property inquiry are telescoped into the single, dominating question of whether there is sufficient reason for a law infringing on property.<sup>67</sup> According to Roux, this approach will tend to resolve cases on an *ad hoc* facts-focused basis rather than a principled one.<sup>68</sup> Another implication is that foreign law will play little or no role in future constitutional property law cases because the multi-factor balancing test set out in *FNB* is aimed at focusing the court’s attention on the facts of the

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<sup>64</sup> T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 23-24 states that the Constitutional Court, in formulating the *FNB* methodology, deliberately retained an almost absolute discretion to decide future cases in the manner it deems fit. See also AJ van der Walt “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 at 79.

<sup>65</sup> See the discussion of the *Mkontwana* decision below.

<sup>66</sup> T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 274.

<sup>67</sup> T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 3; T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 270; H Mostert & PJ Badenhorst “Property and the bill of rights” in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (Issue 18 2006) 3FB-18.

<sup>68</sup> T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 275.

particular case, rather than on principles or rules that may have been developed in other jurisdictions.<sup>69</sup>

## **2 2 6 Application of the arbitrariness test**

The *FNB* decision provides a framework for the meaning and interpretation of section 25.<sup>70</sup> The *FNB* decision is specifically important for the application of the arbitrariness test, which requires the court to establish whether there is sufficient reason for a deprivation. The meaning of “sufficient reason” is flexible. Deprivation is justified when there is a sufficient relationship between the means employed, namely the deprivation in question, and the ends sought to be achieved, namely the regulatory purpose of the law in question.<sup>71</sup> This means-ends analysis requires an evaluation of the purpose for the deprivation, the person whose property is affected, the nature of the property and the extent of the deprivation in respect of such property.<sup>72</sup> In some circumstances the legislative purpose of the deprivation may be so important that no more than a rational connection between means and ends would be required, while in other instances the ends would have to be more compelling to prevent the deprivation from being arbitrary.<sup>73</sup> According to the Court, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will

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<sup>69</sup> T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 281.

<sup>70</sup> See the discussion above.

<sup>71</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>72</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>73</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 66; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 49. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 245-246.

have to be established for the deprivation to be justified. Similarly, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will also have to be more compelling.<sup>74</sup> Furthermore, with regard to the extent of the deprivation the Court has indicated that a lower level of scrutiny is required when the deprivation in question is slight and a higher level of scrutiny when it is substantial or significant.<sup>75</sup> Where on the continuum the applicable standard of review will fall will depend on the legislative purpose and the factual circumstances of the case. The application of the arbitrariness test by the courts is discussed below with regard to three Constitutional Court decisions, namely *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>76</sup> (*FNB*); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others*<sup>77</sup> (*Mkontwana*) and *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another*<sup>78</sup> (*Reflect All*).

The first consideration in terms of the *FNB* arbitrariness test is the purpose for the deprivation. Van der Walt points out that very little has been said about how the level of scrutiny is related to the purpose for the deprivation.<sup>79</sup> According to Van der Walt, the purpose for the deprivation is subjected to judicial scrutiny, but only in relation to the nexus between the purpose for the deprivation, the nature of the

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<sup>74</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>75</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 229.

<sup>76</sup> 2002 (4) SA 768 (CC).

<sup>77</sup> 2005 (1) SA 530 (CC).

<sup>78</sup> 2009 (6) SA 391 (CC).

<sup>79</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 229.

property, the person affected and the extent of the deprivation.<sup>80</sup> Foreign law provides a good example of how the purpose for the deprivation determines the level of judicial scrutiny. In terms of foreign law, deprivation of property falling within the core function of the police power, namely limiting property rights for the protection of public health and safety, is usually subject to a lower level of judicial scrutiny; whereas deprivations that fall outside the core function of the police power, moving into borderline or less compelling public interest areas may require a higher level of scrutiny.<sup>81</sup>

According to Van der Walt, *FNB* provides some indication, albeit vaguely, that the purpose of the deprivation can play a role in deciding the applicable level of scrutiny.<sup>82</sup> In terms of the *FNB* decision, a higher level of judicial scrutiny could apply when the purpose of the regulation is to make it easier for the state to carry out its day-to-day business, such as collecting debts or taxes.<sup>83</sup> The *FNB* case dealt with the constitutionality of section 114 of the Customs and Excise Act 91 of 1964. Section 114 was a fiscal measure that authorised a dispossession of all rights, use and benefit an owner had in corporeal movable goods. The deprivation was intended to secure payment of outstanding customs debts and assumed the form of granting the state a statutory lien over certain goods. Section 114 was widely formulated and applied irrespective of any significant nexus between the Commissioner of South African Revenue and the non-debtor third party over whose property a lien was

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<sup>80</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 229.

<sup>81</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 228 mentions building regulations aimed at preserving the character and aesthetic appearance of a neighbourhood as an example of a borderline public purpose.

<sup>82</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 228.

<sup>83</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 228.

created.<sup>84</sup> The detention of the goods could continue indefinitely and the goods could be sold in execution to satisfy the outstanding customs debt. In the latter event, the Commissioner would by virtue of section 114 enjoy preference on the proceeds of the sale. The Court held that statutory fiscal provisions were not immune from constitutional scrutiny, no matter how indispensable they may be for the economic well-being of the country.<sup>85</sup> The purpose of section 114 was to create a powerful mechanism for exacting customs debts. According to the Court, this is a legitimate and important legislative purpose.<sup>86</sup> However, Van der Walt points out that the purpose of section 114 does not fall within the core function of the police power, namely protecting and promoting public health and safety, but rather in the less compelling public interest area of assisting the state in its day-to-day functioning such as collecting taxes and debts; thus indicating a level of scrutiny that is higher than mere rationality review.<sup>87</sup> Furthermore, the nature of the property was ownership of corporeal movables (motor vehicles) and the deprivation embraced all the incidents of ownership (use and enjoyment of the property),<sup>88</sup> both indicating that more compelling reasons are required for the deprivation to be justified. The Court found that the property had no connection to the customs debt and that FNB had no connection to the transaction that gave rise to the customs debt and had not placed the customs debtor in possession of the property under circumstances that induced

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<sup>84</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 36. The effect of section 114 of the Customs and Excise Act was that property, unrelated to the customs debt and belonging to an innocent third party (in this case FNB) who is not a customs debtor was also subject to the statutory lien.

<sup>85</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 31.

<sup>86</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

<sup>87</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 228.

<sup>88</sup> Although the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 24 stated that the detention of goods does not constitute an actual infringement of a right in the sense of losing ownership it does constitute a continuing and real threat of sale.

the Commissioner to act to his detriment in relation to the incurring of customs debt.<sup>89</sup> In this regard, the Court held that section 114 “cast the net far too wide”.<sup>90</sup> The absence of a sufficient relationship between the purpose of the deprivation, the nature of the property and the person affected by deprivation rendered section 114 arbitrary for purposes of section 25(1). The Court accordingly declared section 114 constitutionally invalid to the extent that it subjected goods owned by a person who was not the customs debtor to a lien that might result in the detention and sale of the goods for the purpose of exacting customs debts.<sup>91</sup>

Subsequent to *FNB*, the *Mkontwana* case also dealt with a statutory fiscal provision that effected a regulatory deprivation aimed at assisting the state in carrying out its day-to-day business of collecting taxes and debts. The case concerned the constitutional validity of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 that in effect placed an embargo on the transfer of immovable property in certain circumstances. Section 118(1) provides that the Registrar of Deeds may only register a transfer upon production of a certificate issued by the Municipality stating that the consumption charges that became due during the two years preceding the date of application for the certificate has been fully paid. No distinction was made between consumption charges accumulated by owners who occupied their own property and persons who occupied property owned by someone else. Many owners who did not occupy their own property were unaware of the substantial outstanding consumption charges incurred by the occupiers (both lawful and unlawful) of the relevant property. The provision was challenged on the

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<sup>89</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

<sup>90</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

<sup>91</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 133.



basis that it constituted arbitrary deprivation of property in conflict with section 25(1) of the Constitution.

A deprivation is arbitrary if the relation between the means employed and ends sought to be achieved is insufficient, having regard to the purpose for the deprivation, the nature of the property and the person affected and the extent of the deprivation. Similar to the *FNB* decision, the purpose of section 118(1) is a non-core police power purpose aimed at fiscal efficiency or state governance considerations and as such it should be subjected to a higher level of judicial scrutiny.<sup>92</sup> The nature of the property affected in this case was immovable property, which requires more compelling reasons for the deprivation to be justified. The deprivation only applies to property that cannot be transferred due to outstanding consumption charges owed to the relevant Municipality in which the property was situated. The Court nevertheless held that the services the Municipality rendered to the properties in question were essential for the occupiers' use and enjoyment of the property and these services also increased the value of the property.<sup>93</sup> Section 118(1) accordingly established a sufficient relationship between the consumption charges and the property. Furthermore, the deprivation only limited the owner's right to alienate his property, which is just one of the incidents of ownership, and even then only temporarily, until such time as the outstanding consumption charges have been paid.<sup>94</sup>

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<sup>92</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 230-231. Section 118(1) of the Local Government: Municipal Systems Act states that no transfer of immovable property may be registered without a certificate issued by the Municipality in which the relevant property is situated, stating that all consumption charges that became due "*in connection with that property*" have been fully paid (own emphasis).

<sup>93</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) paras 40, 110.

<sup>94</sup> In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) paras 33, 91



The Court's argument is not above criticism. In terms of the *FNB* arbitrariness test, a more compelling purpose will have to be established when the deprivation embraces all the incidents of ownership compared to when the deprivation only affects some incidents of ownership and those incidents only partially.<sup>95</sup> The extent of deprivation depends on the extent of the owners' indebtedness to the Municipality. It is possible that the consumption charges accumulated over the two year period may be so high as to exceed the market value of the relevant property and thereby render a sale uneconomical. Therefore, the extent of deprivation will have to be determined on an *ad hoc* basis. With regard to the person affected by the deprivation, a distinction was drawn between owners who occupy their own property and non-owner occupiers. The constitutionality of the deprivation with regard to the first category of owners was not in dispute. There was no doubt that there was a sufficient reason for the deprivation of the property in those cases.<sup>96</sup> However the relation between the deprivation and the category of non-owner occupiers is more problematic. The court *a quo* concluded that there was no connection between section 118(1) and the affected persons on the basis that the provision applied in the case of a vast array of non-owners, in particular to unlawful occupiers who never had the owner's consent to occupy.<sup>97</sup> However, the Constitutional Court held that there is always a level at which the owner and the debt are connected regardless of the nature of the relationship between the owner and the occupier and whether the

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the Constitutional Court held that the right to alienate property is an important incident of property rights.

<sup>95</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>96</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 112.

<sup>97</sup> *Nkuthula Phyllis Mkontwana v Nelson Mandela Municipality and Others* (SECLD) Case No 1238/02; *Peter William Bissett and Others v Buffalo City Municipality and Others* (SECLD) Case No 903/2002, 13 September 2003 (unreported decisions).

property is lawfully occupied.<sup>98</sup> The Court stated that the owner was bound to the property by reason of his ownership, which entails certain rights and responsibilities.<sup>99</sup> Section 118(1) was concerned, amongst other things, with the question whether the Municipality or the property owners should bear the risk when non-owner occupiers who were obliged to make these payments in the first instance failed to do so.<sup>100</sup> The purpose of section 118(1) was to place the risk on property owners.<sup>101</sup> The Court concluded that there may be instances, notably in the case of unlawful occupiers, where it is arguable that the supply of municipal services to the property for consumption by the occupier is of no benefit to that owner, but it was nevertheless fallacious to require that the owner must benefit from the consumption charge before it can be said that there is a relationship between the consumption charge and the property owner.<sup>102</sup> According to the Court the strong relationship

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<sup>98</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 41.

<sup>99</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) paras 41, 109. According to the Constitutional Court, owners have a responsibility to take steps to limit the potential municipal debt in respect of their properties and thereby have some power to limit the potential deprivation of their right to alienate their property. These steps include careful selection of tenants with an eye to ensuring that they will be able to meet financial responsibilities; owners can include provisions in lease agreements which will promote payment of municipal charges; owners can install pre-paid meters on their premises and require occupiers to pay for the use of electricity in advance (thereby eliminating municipal debt); or owners can take steps to evict unlawful occupiers who are consuming municipal services.

<sup>100</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 38.

<sup>101</sup> In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 38 the Constitutional Court held that the “purpose is important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions. It also has the potential to encourage owners of property to discharge their civic responsibility by doing what they can to ensure that money payable to a government organ for the delivery of service is timeously paid”.

<sup>102</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) paras 42, 115-116. In the minority judgment O'Regan J held that despite being practically cumbersome, the

between the consumption charges and the property compensated for the attenuated relationship between the consumption charge and the owner.<sup>103</sup> Therefore, the Court concluded that section 118(1) did not constitute arbitrary deprivation of property for purposes of section 25(1).

The purpose for the deprivation is one of the considerations that need to be taken into account when courts determine the applicable level of scrutiny to the property dispute before it. Van der Walt explains the foreign law approach to using the purpose of the deprivation as an indication of the level of judicial scrutiny.<sup>104</sup> In terms of the foreign law approach, a low level of scrutiny is required for regulatory deprivations that fall within the core function of the police power, namely protecting and promoting public health and safety, whereas a higher level of scrutiny is required for regulatory deprivations that fall outside this core function of the police power. Although it seems that the Court in *FNB* followed a similar approach, in the sense of applying a higher level of scrutiny (something closer to proportionality) to regulatory deprivations aimed at promoting the state's fiscal efficiency, which fall outside the core function of the police power, it did not adhere to this approach in the *Mkontwana* decision. In *Mkontwana* the Court regarded the purpose of section 118(1) as important enough to indicate a lower level of scrutiny (something closer to rationality than proportionality), although it in fact fulfilled a similar function as section 114 did in *FNB*, namely enabling the state to collect debts and taxes. It may not always be easy to determine whether the purpose for a deprivation falls within the core function of the police power. In some cases the purpose of the deprivation can easily be classified

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payment-inducing effect of section 118(1) would lose its vigour if the scope of the provision was narrowed to a particular class of occupiers.

<sup>103</sup> In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 60.

<sup>104</sup> See the discussion of the different levels of scrutiny above.

as falling within the core function of the police power, for example legislation regulating the use and enjoyment of firearms to protect public safety.<sup>105</sup> In other cases it is more difficult to classify the public importance of the regulatory deprivation, for example road planning regulations.<sup>106</sup>

Roux's prediction seems to be accurate that the outcome of a case will largely be determined by the level of scrutiny the court decides to apply.<sup>107</sup> The cases discussed above indicate that the level of scrutiny is determined on a case by case basis. Furthermore, the *FNB* arbitrariness test leaves much scope for judicial discretion. This is evident in the Court's inconsistent approach to the purpose for the deprivation, one of the factors to consider in determining the level of scrutiny, in the *FNB* and *Mkontwana* decisions. The wide scope of judicial discretion in determining the level of scrutiny is also evident in the different conclusions reached by the majority and minority in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another*<sup>108</sup> (*Reflect All*). In *Reflect All* the constitutionality of section 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 (hereafter the Act) was challenged. The Act came into operation in 2003 and replaced the Transvaal Roads Ordinance 22 of 1957

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<sup>105</sup> The Firearms Control Act 60 of 2000 prohibits the possession of firearms without a licence and restricts the number of licences a person may hold in respect certain types of firearms. In *Justice Alliance of South African and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012) (*Justice Alliance*) the Supreme Court of Appeal had to consider the constitutionality of the provisions of the Act that rendered firearms once held legally in terms of the Arms and Ammunitions Act 75 of 1969 (repealed and replaced by the Firearms Control Act) unlawful and subject to forfeiture to the state to be destroyed without compensation. The extent of the deprivation was severe, namely total loss of the property. However, the purpose for the deprivation was regarded as crucial and therefore the level of scrutiny was low in the sense that the means chosen, namely total deprivation of all incidents of ownership of the firearms was rationally connected to the ends sought to be achieved, namely protecting the public safety. See chapter 4 for a discussion of the Firearms Control Act and the *Justice Alliance* decision.

<sup>106</sup> In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) paras 50, 64 the Constitutional Court held that road planning is an important mechanism for promoting economic growth and welfare. Furthermore, the Court held that the planning process has economic value and is in the long run in the public interest.

<sup>107</sup> See the discussion of Roux's argument above.

<sup>108</sup> 2009 (6) SA 391 (CC).

(hereafter the Ordinance) in terms of which route determinations and preliminary designs for future provincial roads were published in the *Provincial Gazette*. There were no legal restrictions on the use of land within the route determinations or the preliminary designs under the Ordinance. However, the Act changed the procedures for the establishment of route determinations and preliminary designs as well as the legal restrictions imposed on land affected by such routes and designs. Both subsections 10(1) and 10(3) imposed a number of legal restrictions upon land affected by route determinations and preliminary designs accepted under the Ordinance. Section 10(1) concerned route determinations and section 10(3) concerned preliminary designs. The Constitutional Court was asked to determine whether subsections 10(1) and 10(3), which in effect froze the land within the road or rail reserve, constituted an arbitrary deprivation of property in terms of section 25(1) of the Constitution. Section 10(1) invoked legal restrictions under section 7, which provided that no services may be laid over or below the land falling within the route determinations without the written permission of the Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government (hereafter the MEC) or in terms of a registered servitude. Property owners could apply for certain changes to the affected land provided that such application was accompanied by a report by a civil engineer. Section 10(3) invoked legal restrictions under section 9, which *inter alia* prohibited the granting of applications for the establishment of townships and or any change of land use in terms of any law or town planning. Section 8(9) empowered the MEC to amend preliminary road designs upon written application by anyone who desired such preliminary design to be amended, accompanied by the payment of the prescribed fee.

The Constitutional Court concluded that section 10(1) and 10(3) did deprive the property owners affected by these provisions in some respect of the use, enjoyment

and exploitation of their properties.<sup>109</sup> The Court proceeded to consider whether the deprivation was arbitrary. The Court followed the *FNB* arbitrariness test and considered the purpose for the deprivation. Although the Court accepted that road planning is an important mechanism for promoting economic growth and welfare it stated that it cannot be gainsaid that regulation of the use of property in this case was for the public good.<sup>110</sup> This statement seems to adopt something similar to the foreign law approach discussed above in the sense that road planning regulations are not considered to fall within the core function of the police power and might therefore require a higher level of judicial scrutiny than mere rationality. The property affected by the deprivation was immovable, which would in terms of the *FNB* arbitrariness test require more compelling reasons for the deprivation. Furthermore, the Act only applied to owners of properties falling within the route determinations and preliminary designs accepted under the Ordinance and subsequently the Act. It is interesting to note that the minority and the majority judgment differed on whether there was a sufficient relationship between the purpose for the deprivation and the extent and impact of the deprivation on affected property owners. Although the deprivation affected immovable property, the property owners were not deprived of their property in entirety.<sup>111</sup> Furthermore, the limiting provision of the Act deprived the land owner only of the right to exploit the affected part of the land within the road reserve.<sup>112</sup> The Court also considered the indefinite-time aspect of the deprivation.<sup>113</sup> Some of the road schemes under the Ordinance are over three decades old. Most of

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<sup>109</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 38.

<sup>110</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 50.

<sup>111</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 53.

<sup>112</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 64.

<sup>113</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) paras 69-70.



these road determinations and designs have not been implemented and it was unclear when, if ever, such roads will be built.<sup>114</sup> However, the Court also considered the expenses the state incurred in the development of these route determinations and preliminary designs.<sup>115</sup> The majority held that the obstacles created by sections 10(1) and 10(3) were not insurmountable. The affected property owners could approach the MEC in terms of section 8(9) and request that the preliminary road designs be amended. Furthermore, section 9 authorised the MEC to relax the prohibition in relation to access roads. The amendment and relaxation procedure, according to the majority of the Constitutional Court, significantly reduced the impact of the deprivation and struck a balance between the protection of individual property rights on the one hand, and the protection of the Province's legitimate interest in the hypothetical road network, on the other.<sup>116</sup> Therefore, the majority concluded that sections 10(1) and 10(3) did not constitute arbitrary deprivation of property as meant in section 25(1) of the Constitution.<sup>117</sup>

Although both the majority and the minority applied a higher level of scrutiny, the minority disagreed with the majority's conclusion that the deprivation was proportionate to the extent of the deprivation.<sup>118</sup> In the minority judgment O'Regan J disagreed with the majority's finding that section 10(3) did not constitute arbitrary

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<sup>114</sup> In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) paras 18, 67 the Constitutional Court stated that there was no principle in law that obliged the state to implement a road scheme merely because its planning has been approved.

<sup>115</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) paras 18, 67.

<sup>116</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 58.

<sup>117</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) paras 86-87.

<sup>118</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 97.

deprivation of property.<sup>119</sup> According to O'Regan J, the limitation of the landowners' rights occasioned by section 10(3) was quite weighty.<sup>120</sup> Moreover, O'Regan J did not view the amendment and relaxation measures provided for in section 8 and 9 of the Act as sufficient to reduce the impact of the deprivation. O'Regan J stated that the MEC would surely be reluctant to amend a preliminary design on the application of one landowner. Road design required comprehensive determination in one process at one time. The amendment of a preliminary design may have the consequence of threatening the viability of the road design in its entirety or of imposing burdens on other landowners.<sup>121</sup> Therefore, piecemeal amendment of a preliminary road design in a manner that could significantly reduce the burdens on landowners affected by the proposed road was likely to be rare. The minority therefore argued that section 10(3) deprived a landowner of the right to seek permission to develop the land, to subdivide it or to change its land use. Furthermore, the absence of a provision for future review of preliminary designs in the Act allowed for the deprivation to endure indefinitely. The minority also considered the fact that the Act affected hundreds of landowners.<sup>122</sup> Although the minority decision agreed that the purpose the Act sought to achieve was important and in the public interest, the minority concluded that the Act was not adequately formulated to achieve the legislative purpose.<sup>123</sup> According to the minority decision, the absence of a review procedure in the legislation of the preliminary designs placed a disproportionate

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<sup>119</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 97.

<sup>120</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 98.

<sup>121</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 105.

<sup>122</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 107.

<sup>123</sup> The minority decision in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 109 stated that the Gauteng Transport Infrastructure Act does not provide for the abandonment of proposed roads that have become unnecessary or undesirable.



burden on landowners and consequently constituted an arbitrary deprivation.<sup>124</sup> O'Regan J argued that the disproportionate effect of the deprivation could be ameliorated by a periodic review of the proposed infrastructure network.<sup>125</sup>

Roux is correct in his criticism that the *FNB* arbitrariness test leads to uncertainty for both the state and aggrieved property holders. The wide margin of judicial discretion when determining the level of scrutiny leads to uncertain and inconsistent judgments. This is evident in the inconsistent treatment of regulatory deprivations for the purpose of promoting the state's fiscal efficiency in the *FNB* and the *Mkontwana* decision and also in the conflicting outcomes of the majority and the minority judgment in *Reflect All*. Although the Court in *FNB* set out factors that should be considered in establishing the level of scrutiny required, the Court did not indicate how these factors relate to each other.<sup>126</sup> For example, if two or more of the factors indicate a higher level of scrutiny and only one a lower level of scrutiny, should it be accepted that the level of scrutiny should be something higher than rationality or can one factor overrule the other factors? In this regard, Roux correctly asserts that the grounds for the application of the one or the other level of judicial scrutiny should be clear and ascertainable in advance.<sup>127</sup>

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<sup>124</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 109.

<sup>125</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 111.

<sup>126</sup> In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 the Constitutional Court merely stated that the level of scrutiny should be established "[d]epending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation".

<sup>127</sup> T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 274.

### 3 The effect of finding that a deprivation does not comply with the requirements

Section 25(1) both empowers and at the same time restricts the state's power to regulate the use and enjoyment of property. Roux states that the primary function of a constitutional property clause is to strike an appropriate balance between the public interest and individual property rights.<sup>128</sup> Section 25 was considered for the first time by the Constitutional Court in *FNB* and this decision is significant in the sense that it purported to decide how this balance should be struck. The Court set out a methodology in terms of which section 25 disputes should be considered.

Section 25(1) limits the state's police power by requiring that any regulatory deprivation be authorised in terms of law of general application and that no law may effect arbitrary deprivation of property. Any regulatory deprivation that is not authorised by law of general application is unconstitutional and consequently invalid. Constitutionally speaking, such a regulatory deprivation measure cannot be salvaged in any way. Moreover, although section 25(1) does not explicitly state that deprivation should be for a public purpose, such a requirement is arguably implicit in section 25(1).<sup>129</sup> Any deprivation that is not for a valid public purpose is also likely to be in conflict with section 25(1) and unconstitutional and invalid. In both these instances it will be the end of the section 25(1) inquiry. Instances of this kind are therefore not interesting for this study.

Furthermore, if the interest affected does not qualify as property for purposes of section 25 the protection afforded by section 25 is not triggered, no matter how

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<sup>128</sup> T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 266.

<sup>129</sup> See the discussion on the public purpose requirement above.

oppressive or unfair the law in question is. Section 25(1) prohibits arbitrary deprivation of property. Similarly, if there has not been a deprivation of the alleged property interest section 25(1) is not triggered either. Before the court can consider whether deprivation was arbitrary it first has to establish that there was a deprivation of property in the first place. Although there are inconsistencies in the Constitutional Court's definition of deprivation, it seems clear enough that any interference with the use, enjoyment or exploitation of private property, subject to the *de minimis* principle, will be classified as a deprivation for purposes of section 25. Instances where it cannot be proven that there is a property interest or that there has been a deprivation of a property interest in this sense are not interesting for this study either.

The focus of this study is the requirement in section 25(1) that no law may allow arbitrary deprivation of property. According to the established case law of the Constitutional Court, a regulatory interference with property rights is arbitrary if there is insufficient reason for the deprivation. The arbitrariness test requires a contextual balance between means and ends. The determination of non-arbitrariness depends on the level of judicial scrutiny, which may fluctuate from rationality to proportionality review, depending on the purpose for the deprivation and the facts of the case. The level of judicial scrutiny is determined by considering a complexity of relationships, namely the relationship between the purpose for the deprivation and the nature of the property, the extent of the deprivation and the person whose property is affected. The application of the arbitrariness test in the case law discussed above indicates that the *FNB* arbitrariness test leaves much scope for judicial discretion and the level of scrutiny that courts will apply cannot be determined abstractly beforehand. This has important implications for legal certainty as the outcome of cases will depend on the level of scrutiny the court decides to apply.

Having said all that, the focus of this study is on the effects of a court deciding that a seemingly excessive deprivation is arbitrary in a specific set of instances, where invalidation of the deprivation is not an option because of the importance of the reason for it. If there is insufficient reason for the deprivation the state action is arbitrary for purposes of section 25(1), even when the reason for the deprivation is very important. As appears below, this will usually be the case where the purpose for a deprivation is extremely important, but the deprivation is nevertheless arbitrary because its effects in an individual case are excessive.

According to the methodology in *FNB*, if the deprivation does not comply with section 25(1) it should be considered whether it can be justified under section 36 of the Constitution,<sup>130</sup> but Roux<sup>131</sup> and Van der Walt<sup>132</sup> argue convincingly that it is unlikely that deprivation or expropriation that does not comply with the requirements of section 25(1) and (2) can be justified in terms of section 36.<sup>133</sup> An example of an

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<sup>130</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

<sup>131</sup> T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 26.

<sup>132</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 76.

<sup>133</sup> IM Rautenbach "Means-end rationality in Constitutional Court judgments" 2010 *Tydskrif vir die Suid Afrikaanse Reg* 768-779 at 770 criticises the courts' approach of limiting the means-end rationality analysis to the limitation clause that forms part of a specific fundamental right in the Bill of Rights without a further full blown section 36 analysis. Section 25(1) is an example of a fundamental right with a limitation clause. Rautenbach advocates for a more prominent role of section 36 of the Constitution in section 25(1) cases. See also IM Rautenbach "The limitation of rights in terms of provisions of the Bill of Rights other than the general limitation clause: A few examples" 2001 *Tydskrif vir die Suid Afrikaanse Reg* 617-641; IM Rautenbach "Vonnisbespreking: Rasionaliteit – Die president se eie administratiefreg? *Democratic Alliance v President of the RSA* 2012 12 BCLR 1261 (KH)" (2013) 2 *LitNet Akademies* 27-44. T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 27 points out that a rationality based review in terms of the arbitrariness test proves the strongest conceptual non-application of section 36 since a law that infringes upon section 25(1) for lack of means-end rationality will never be capable of justification under section 36. On the other hand, a section 36 analysis where proportionality based review in terms of the arbitrariness test was applied, will at best only confirm the conclusion already reached under section 25(1). Furthermore, Roux argues that although the Constitutional Court in *FNB* acknowledged the difficulties in applying section 36 to infringements of section 25(1), it nonetheless did a cursory limitation enquiry, which tends to confirm the view that section 36 has no meaningful application to infringements of section 25(1). See also T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 278, 280; I Currie & J de Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 557-558; AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 219, 288; J van Wyk *Planning law* (2<sup>nd</sup> ed 2012)

exception to this argument may exist in case law dealing with section 25(2), although it is probably of limited value for section 25(1). In *Nhlabathi and Others v Fick*<sup>134</sup> (*Nhlabathi*) the Land Claims Court accepted without deciding the point that, if the legislation at stake in that case indeed effected an uncompensated expropriation of property, in conflict with section 25(2), it would nevertheless be justified under section 36 of the Constitution. However, the *Nhlabathi* example serves as limited authority for the proposition that an infringement that is inconsistent with section 25(2) can be justified in terms of section 36 because the court only assumed for the sake of the argument that there was expropriation, without actually deciding that there was in fact an expropriation (and accordingly that the expropriation without compensation could be justified).<sup>135</sup> Even assuming that there was an uncompensated expropriation in this case and that it was justifiable in terms of section 36(1) does not necessarily imply that it would also be possible to justify an arbitrary deprivation that conflicts with section 25(1) in the same way.<sup>136</sup> The unconstitutionality of a deprivation that does

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228; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 530.

<sup>134</sup> 2003 (7) BCLR 806 (LCC) para 35.

<sup>135</sup> See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 79 for a discussion of the *Nhlabathi* decision. See also H Mostert & PJ Badenhorst "Property and the bill of rights" in Y Mokgoro & P Tlakula (eds) *Bill of rights compendium* (Issue 18 2006) 3FB-15; I Currie & J de Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 558-559.

<sup>136</sup> A troublesome question in this regard is whether all expropriations should literally be treated as deprivations of property first and only as expropriation afterwards, as the *FNB* methodology indicates. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57 the Constitutional Court held that expropriation is a subset of deprivation, therefore all expropriations are deprivations but not every deprivation is an expropriation. In principle, every expropriation must therefore comply with the requirements of section 25(1) in addition to the requirements of section 25(2) and (3). However, AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 225 states that it cannot be assumed that the courts will always follow the *FNB* methodology strictly, in the sense of starting out with a non-arbitrariness analysis. Subsequent to the *FNB* decision, courts have indicated that there are two instances when they would be willing to depart from the *FNB* methodology and proceed directly to the expropriation analysis without first considering whether the deprivation was arbitrary. In *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 53 the Constitutional Court held that the court may directly consider whether expropriation occurred if the claimants are content not to allege that the deprivation of property was arbitrary or when the only matter in dispute is the compensation payable on expropriation. See also *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) para 14. With regard to direct questions about the amount of compensation, see *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC). See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 509-520; AJ van der Walt "The state's duty to pay 'just and equitable' compensation for expropriation: Reflections on the *Du Toit* case" (2005) 122 *South*

not comply with section 25(1) because it is deemed arbitrary can probably not be overcome by a section 36 justification.

If a regulatory deprivation does not comply with section 25(1) because it is arbitrary and cannot be justified under section 36 the default remedy is to declare such state action unconstitutional and therefore invalid.<sup>137</sup> Section 172(1)(a) of the Constitution provides that, when deciding a constitutional matter, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Currie and De Waal explain that a declaration of invalidity is a remedy that the courts grant whenever a particular state action or legislation is inconsistent with the Constitution.<sup>138</sup> On the face of it, any deprivation of property that is deemed arbitrary because its effects are excessive therefore seems to face the inevitable result of being declared invalid.

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*African Law Journal* 765-778; AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" (2006) 123 *South African Law Journal* 23-40. With regard to the time and manner of payment of compensation, see *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC). See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 508-509. Whether it is possible for a claimant to challenge the validity of an expropriation on the basis of the public purpose or public interest requirement in section 25(2)(a) without first arguing that the deprivation was arbitrary remains unclear. T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 33 argues that it is doubtful whether a law will ever be tested against section 25(2)(a) because expropriation that is not for a public purpose or in the public interest is unlikely to pass the arbitrariness test. However, in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11 (4 February 2010) paras 1, 4, 5 the applicant directly challenged the expropriation on the basis that it was not for a public purpose, without challenging the validity of the infringement against section 25(1). In this case the applicant challenged the Municipality's decision to transfer his expropriated property to a private land developer to develop a shopping complex on the basis that it did not constitute a public purpose as meant by section 2 of the Expropriation Act 63 of 1975. The court merely stated that the Expropriation Act constituted law of general application as meant by section 25(1) and proceeded to determine the meaning of "public purpose" in terms of the Expropriation Act, the scope of which is extended by the insertion of the phrase "public interest" in section 25(2) of the Constitution, without first considering whether the Municipality's action constituted arbitrary deprivation of the applicant's property. See also *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 (4) SA 242 (SCA) paras 13-18.

<sup>137</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 270.

<sup>138</sup> According to I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 193, the wording of section 172(1)(a) indicates that the declaration of invalidity is not a discretionary remedy, which explains why such a remedy attained such a prominent position in constitutional law. See chapter 4 for a discussion on section 172 of the Constitution.



However, although a declaration of invalidity is the default remedy, section 172(1)(b) also provides that, in addition to the declaration of invalidity, a court “may make any order that is just and equitable”.<sup>139</sup> Section 38 of the Constitution also provides that the court may grant “appropriate relief” where fundamental rights have been violated.<sup>140</sup> The relationship between just and equitable relief in section 172(1)(b) and section 38 is not clear. However, the courts state that section 172(1)(b) and section 38 should be read together.<sup>141</sup>

Courts recognise that the declaration of invalidity may not always be enough to eradicate inconsistencies between law and conduct.<sup>142</sup> The declaration of invalidity may often be meaningless, which will not constitute appropriate relief for purposes of section 38.<sup>143</sup> In *President of the Republic of South African and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*<sup>144</sup> (*Modderklip*) for example, the landowner’s property was occupied by a sheer number of unlawful occupiers, which rendered the land useless for the duration of the unlawful occupation. According to the Constitutional Court, the state failed to fulfil its constitutional duty to the affected landowner when it refused to assist the landowner in evicting the

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<sup>139</sup> See chapter 4 for a discussion on the interplay between section 172(1)(a) and section 172(1)(b) of the Constitution.

<sup>140</sup> In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 19, 69 the Constitutional Court held that

“[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

Furthermore, the Court stated that “an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the right entrenched in the Constitution cannot properly be upheld or enhanced”. See chapter 4 for a discussion on what constitutes “appropriate relief” as meant by section 38.

<sup>141</sup> See chapter 4 for a discussion of the relationship between section 172(1)(b) and section 38.

<sup>142</sup> I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 194.

<sup>143</sup> I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 194.

<sup>144</sup> 2005 (5) SA 3 (CC). See chapter 4 for a discussion of the *Modderklip* decision.

unlawful occupiers. However, the Court recognised that declaring the state's action invalid in that instance would not have vindicated the affected landowner's property rights in a just and equitable manner.

Another instance where invalidity may not be an appropriate remedy is for example a rental housing scheme that statutorily limits certain lessors' right to raise the annual rent or to evict tenants from their property for the purpose of protecting tenants of rental property in a period of a dire housing shortage. If the court found that the relevant Act effects an arbitrary deprivation of property in terms of section 25(1), for example because the court finds that the purpose for the deprivation is disproportionate to the impact of the deprivation, the default remedy will be to declare the regulatory provision of the Act invalid. However, an important and necessary public purpose, namely the protection and promotion of access to adequate housing, will be negated if the relevant provision were to be declared invalid.<sup>145</sup>

It is imperative that regulatory measures that serve a legitimate, necessary and important public purpose and that are otherwise lawful, but for the excessive and disproportionate burden they impose on an individual or select group of property owners (therefore constituting a substantially arbitrary deprivation of property in terms of section 25(1)) should be saved from invalidity whenever it is possible to do so in terms of the Constitution.<sup>146</sup> The possibilities of doing so and the deprivations of property that are implicated form the main focus of this dissertation. The question is therefore: If a regulatory action that serves a legitimate, necessary and important

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<sup>145</sup> See also chapter 4 for a discussion of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

<sup>146</sup> Otherwise legitimate and lawful regulatory measures mean that the regulatory deprivation is authorised by law of general application and serve a public purpose but may be arbitrary because the burden it imposes on an individual owner or a small group of property owners may sometimes be harsh and excessive. If the regulatory measure is not authorised by law of general application or does not serve a public purpose or imposes a procedurally arbitrary deprivation of property, the regulatory measure is unconstitutional and cannot be saved from invalidity.



purpose and that is otherwise valid runs the risk of being declared invalid simply because it is substantively arbitrary in terms of section 25(1) for imposing an excessive and disproportionate burden on an individual or select group of property owners, what are the constitutional options in terms of which the authorising statute and the regulatory action can be upheld?

Various approaches in foreign law serve as examples of alternatives to invalidating important and otherwise lawful but excessive regulatory measures. The purpose of the comparative overview is to describe a number of alternative approaches to invalidating excessive regulatory measures that exist in foreign law and to analyse whether these approaches may serve as appropriate examples for developing a solution for South African law. The foreign jurisdictions considered in this dissertation are selected on the basis of the different ways in which courts and academic literature's describe the problem of excessive regulatory measures and the unique approaches that developed in these jurisdictions to develop different solutions. Some jurisdictions (Ireland) are discussed especially because they illustrate the dilemma of courts' not having an alternative to invalidating excessive regulatory interferences. A central question that runs throughout the comparative overview is whether courts recognise possibilities to uphold regulatory measures that serve a necessary and important public purpose, even when they impose an unforeseen, excessive and perhaps disproportionate and unconstitutional burden on one or a small group of property owners.<sup>147</sup> The approach in the comparative chapters is largely descriptive because the goal is not to analyse any particular jurisdiction in detail, but simply to show how different perceptions of the problem and different solutions have developed in different contexts. For that purpose, the description of the legal position in the jurisdictions that are discussed in the

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<sup>147</sup> See the discussion below on the various foreign jurisdictions considered in this dissertation.

comparative chapters relies largely on the majority view in that jurisdiction, without entering into debates and differences of opinion about the suitability and the technical detail of the particular approach.

One alternative to invalidity that is relied on, in different ways, in a number of jurisdictions is to treat the excessive regulatory measure as some form of expropriation, which requires compensation (Switzerland, US).<sup>148</sup> In terms of what is here broadly described as the constructive expropriation strategy, courts treat excessive regulatory interferences with property rights as expropriation and require the state to pay compensation even though there was no formal expropriation of property. The comparative overview shows that this strategy can adopt different formats in different jurisdictions, depending on the constitutional text, the social and political context and the underlying legal tradition. Whether the notion of constructive expropriation can be recognised in South African law is not clear since the Constitutional Court has not explicitly accepted nor rejected this doctrine.

Another alternative is to rely on legislation to provide for expropriation-like compensation, without transforming the deprivation into expropriation (Germany, France, Belgium, The Netherlands). This type of compensation is aimed at equalising the impact of the burden, thereby preventing it from constituting arbitrary deprivation of property.<sup>149</sup> Once again, the comparative overview shows that this approach can assume different formats in different jurisdictions, depending on different constitutional texts, the social and political context and the underlying legal tradition. Some South African statutes already provide for compensation of this nature. It is not clear whether South African courts can read-in a compensation provision, without transforming the regulatory deprivation into expropriation (as with the notion of

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<sup>148</sup> See chapter 2 for a discussion of constructive expropriation.

<sup>149</sup> See chapters 3 and 4 for a discussion of expropriation-like compensation provisions in legislation.

constructive expropriation), into an otherwise lawful regulatory statute that imposes an excessive burden on one or a small group of property owners. Another alternative remedy to invalidation is a constitutional remedy in the form of constitutional damages in terms of section 38 read with section 172(1)(b) of the Constitution.<sup>150</sup>

The conclusion in this chapter is that (a) properly authorised and otherwise lawful measures that serve a legitimate and important regulatory purpose and that (b) are clearly both authorised and intended to regulate the use of property and not to expropriate property (c) can sometimes have such an excessively detrimental effect on property holders, either in the extent to which they interfere with the use of the property or because they single out one or a small number of people the extraordinary regulatory burden that they impose, that (d) a court might find that the deprivation of property caused by those measures is substantively arbitrary and therefore unconstitutional and invalid. This outcome is particularly troublesome if the public purpose served by the regulatory measure falls outside of the narrow sphere of protecting public health and safety, with the result that the courts would assess the effect of the deprivation in terms of a strict proportionality-type scrutiny rather than pure rationality. (e) However, if the public purpose served by the regulatory measure is important enough it might be undesirable to declare the measure invalid. (f) The purpose of the following chapters is to investigate the feasibility, applicability and scope of several strategies that are intended or that can be used to uphold the validity of the regulatory measure while simultaneously overcoming or balancing out the excessive harm that it causes for one or a small number of affected property owners.

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<sup>150</sup> See chapter 4 for a discussion of constitutional damages as a constitutional remedy.

## 4 Outline of chapters

The first alternative solution, namely the notion of constructive expropriation, is considered in chapter 2. In chapter 2 the US, Irish and Swiss law approach to constructive expropriation or regulatory takings is considered.<sup>151</sup> The notion of regulatory takings developed in US case law. US law sets out the most comprehensive and authoritative arguments in favour of regulatory taking for the US constitutional context. Furthermore, the US approach to regulatory takings has played an influential role in other jurisdictions that also recognise regulatory takings or constructive expropriation. The structure of the Irish Constitution is unique and allows for the application of something similar to the US notion of regulatory takings. Unlike US and Irish law, the Swiss Constitution explicitly provides for something like constructive expropriation, called “material expropriation”. Chapter 2 evaluates the appropriateness of the constructive expropriation strategy and considers whether this is a possible and viable solution for South African law, especially with regard the structure of the South African property clause and the South African courts’ attitude toward recognising the notion of constructive expropriation.

Chapter 3 considers the German, French, Dutch and Belgian solution of upholding excessive regulatory measures against compensation, but without transforming the regulatory deprivation into expropriation. The possibility of something similar to constructive expropriation was considered in German law but explicitly rejected by the German Federal Constitutional Court. German law recognises that equalisation measures, which need not always be monetary, may in exceptional situations be included in the regulatory statute that would reduce the burden on the property holder and thereby prevent the statute from authorising a

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<sup>151</sup> See chapter 2 for a discussion on the difference in terminology between constructive expropriation and regulatory taking.

disproportionate regulatory limitation of property rights that would consequently be unconstitutional and subject to invalidity. French, Dutch and Belgian law also recognise that the explicit statutory provision of compensation for excessive regulatory burdens in regulatory legislation may reduce the otherwise disproportionate burden and thereby prevent the regulatory measure from being unconstitutional. However, unlike German law, this type of amelioratory compensation in French, Dutch and Belgian law is generally always monetary. Furthermore, the courts in French, Dutch and Belgian law may sometimes award compensation for excessive regulatory deprivations of property in terms of the *égalité* principle even though there is no statutory authority for such compensation and no formal expropriation has occurred.

In chapter 4 an overview of South African legislation indicates that there are some statutes that, similar to the German, French, Dutch and Belgian law approach, include a non-expropriatory compensation provision that is aimed at reducing the excessive and possible arbitrary burden that may result from the application of the legislation. Chapter 4 also considers the possibility whether South African courts can, like the courts in French, Dutch and Belgian law, award non-expropriatory compensation in instances where the otherwise lawful and legitimate but excessive regulatory statute does not provide for compensation or where the possibility of compensation is explicitly excluded.

As a last alternative solution, chapter 4 considers whether a constitutional remedy in the form of constitutional damages can serve as a viable alternative to invalidating excessive regulatory legislation that serves a necessary and important public purpose that will be defeated if the legislation were to be declared invalid.

## Chapter 2

### Constructive expropriation

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# 1 Introduction

Recognition of something like the notion of constructive expropriation is one possible reaction to instances of excessive or unfair regulatory actions, as an alternative to declaring the regulatory infringement invalid. However, it remains unclear whether it will be possible to recognise something like constructive expropriation in South African law. Much will depend on the distinction that the courts draw between deprivation and expropriation of property, since constructive expropriation effectively occupies a grey area between these two categories. Usually, recognition of such a grey area depends on judicial interpretation, although there are examples of constitutional texts that recognise such a middle category explicitly.

Section 25 of the 1996 South African Constitution distinguishes between deprivation and expropriation as two forms of legitimate state interference with property, in each case provided that certain requirements are met. The constitutional text does not provide a clear-cut definition to facilitate a distinction between these two categories of state interference, but on the basis of the constitutional distinction expropriation is usually defined in contrast to deprivation.<sup>1</sup> A few essential characteristics of expropriation that may help to differentiate expropriation from deprivation include the fact that expropriation is an original form of acquisition; that it is exercised in terms of the state's power of eminent domain; that it involves a complete or partial loss of property of the former holder and acquisition of the property by the state; that it fulfils a public purpose or public interest; and that it is accompanied by compensation.<sup>2</sup>

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<sup>1</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 335.

<sup>2</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 345.

Categorising the type of state action as either deprivation or expropriation becomes more problematic in situations where limitations of private property seem to fall within a grey area that cannot be described clearly as either purely regulatory deprivation or expropriation of property.<sup>3</sup> Murphy argues that this will usually be the case where there has not been an outright transfer or extinction of title but only a substantial diminution in the incidents of ownership.<sup>4</sup> In some jurisdictions these state interferences with property are classified as constructive expropriation because they neither regulate the use of property nor formally expropriate the owner, but in fact extinguish either the property object or the property right in it. State interferences of this kind are said to occupy a grey area in between deprivation and expropriation because they have the formal appearance of regulatory deprivations but have the effect of expropriation, in the sense that the property owner either loses the property right entirely or suffers a loss that is so significant that it resembles expropriation more than it does regulatory deprivation. The issue of compensation plays an important role in this grey area because compensation is a requirement for expropriation whereas deprivation is usually not compensated.<sup>5</sup> Classifying what might otherwise appear to be a regulatory deprivation of property as constructive expropriation is therefore significant in that compensation is consequently required for it. In terms of the doctrine of constructive expropriation or regulatory takings, the

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<sup>3</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 335.

<sup>4</sup> J Murphy "Interpreting the property clause in the Constitution Act of 1993" (1995) 10 *South African Public Law* 107-130 at 118. In *Conforth Investments (Pty) Ltd v Ethekwini Municipality* [2013] ZAKZDHC 68 (28 November 2013) paras 23, 26 the High Court held that "[c]onstructive expropriation deals with a situation where by virtue of a statutory provision, a property owner suffers loss which could justify the conclusion that compensation is necessary even though the state did not, and did not intend to, acquire ownership of the property". Furthermore, the court held that the interference with the property must be significant, in the sense that "it deprives the owner of the property of all his rights of ownership or enjoyment in and to the property, or so interferes with the proprietary value of the property that it is rendered useless".

<sup>5</sup> In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 63 the Constitutional Court held that "[t]he purpose of the distinction between expropriation and deprivation by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation".



excessive regulatory measure is judicially transformed into expropriation. Therefore, a duty to pay compensation arises since compensation is a requirement for a valid expropriation of property.

In some jurisdictions limitations of property that fall within the grey area between deprivation and expropriation are treated as cases of constructive expropriation or regulatory taking of property.<sup>6</sup> Constructive expropriation or regulatory taking occurs when a regulatory deprivation causes an excessive or unfair loss for a property holder, usually in the sense that the affected property is destroyed or becomes worthless, an effect that cannot be justified without compensation, even though the state did not formally expropriate or intend to expropriate the property.<sup>7</sup>

Recognition of constructive expropriation is only possible in jurisdictions that do not place a strong emphasis on the formal authority to expropriate or on actual state acquisition of the property, because focusing on either of these aspects would negate the possibility to judicially transform an excessive regulatory deprivation into a constructive expropriation. The notion of constructive expropriation is premised on the judicial power, based on a proportionality test of some kind, to determine that a particular regulatory burden is so excessive and unfair that it cannot be justified without compensation.<sup>8</sup> Germany is one example of a jurisdiction that places strong emphasis on the formal authority to expropriate and therefore explicitly rejects the

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<sup>6</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 350. See the discussion below on the difference in the terminology.

<sup>7</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 351. See also the distinction between constructive expropriation and formal expropriation in *Conforth Investments (Pty) Ltd v Ethekwini Municipality* [2013] ZAKZDHC 68 (28 November 2013) para 24. With regard to formal expropriation, the court held that “the statute or administrative decision which declares the intention to expropriate property is the key factor, where as in constructive expropriation the intention is to regulate control of the property rather than to expropriate it. With constructive expropriation the property is not acquired by the state, and the state may not even acquire any benefit from it”.

<sup>8</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 354, 376

notion of constructive expropriation.<sup>9</sup> The German approach to excessive regulatory limitations is discussed in chapter 3. Furthermore, in jurisdictions that uphold a clear and categorical distinction between compensable expropriatory acquisition of property and non-compensable regulatory limitation on the use of property or that require state acquisition of property as a requirement for expropriation it is equally impossible to recognise a notion such as constructive expropriation or regulatory taking.<sup>10</sup>

Different terminology is used to describe this phenomenon, namely constructive expropriation, inverse condemnation and regulatory taking. Van der Walt explains that the normal, run-of-the-mill state acquisition of property in terms of the power of compulsory acquisition or eminent domain is usually described in the Anglo or common law tradition as “compulsory acquisition”, whereas most constitutions in the Germanic or civil law tradition refer to “expropriation”.<sup>11</sup> These two terms have roughly the same meaning and it is generally accepted that these terms require the state to acquire property or derive a benefit from the compulsory acquisition or expropriation.<sup>12</sup> In this sense, state actions that destroy property or take property without any benefit for the state will generally not be regarded as compulsory acquisition or expropriation of property that would require compensation.<sup>13</sup>

However, the US Constitution refers to “taking” of property. This term is wider than either compulsory acquisition or expropriation, and it is generally accepted that it includes both expropriation, understood as a narrower category of acquisition of

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<sup>9</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*); confirmed in BVerfGE 100, 226 (1999) (*Denkmalschutz*). See chapter 3 for a discussion of the *Naßauskiesung* and *Denkmalschutz* decisions.

<sup>10</sup> K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 169.

<sup>11</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 18.

<sup>12</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 18.

<sup>13</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 18.

property by the state, and regulatory taking of property, which does not involve state acquisition.<sup>14</sup> Similarly, the Irish Constitution does not explicitly provide for expropriation of property. It authorises the legislature to limit property in terms of legislation but adds that no law may constitute an unjust attack on property.<sup>15</sup> The term “unjust attack” is understood as a wider category than compulsory acquisition or expropriation of property. Therefore, the terminology of the US and Irish constitutions allows for a wider approach to state action that infringes on property rights than compulsory acquisition and expropriation and consequently lends itself to the recognition of a grey area of “regulatory taking” of property that requires compensation.<sup>16</sup> In both cases, the idea of a regulatory taking is employed in case law to refer to a grey area in between uncompensated regulatory deprivation of property and compensated expropriation of property, usually on the basis described earlier, namely that the effect of a particular regulatory action is so extreme or severe on one particular property owner that it cannot be justified in the absence of compensation. Formally the action does not constitute expropriation, but because of its impact it is treated as a special kind of taking that is justified only when accompanied by compensation.

The term “regulatory taking”, sometimes also referred to as “inverse condemnation”, is unique to US law because it was judicially derived from the constitutional term “taking of property”, whereas the term “constructive expropriation” fits the civilian jurisdictions more easily. The Swiss Constitution is unique in the sense that it explicitly provides for “material expropriation”, which resembles the

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<sup>14</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 18.

<sup>15</sup> See the discussion on Irish law below.

<sup>16</sup> AJ Van der Walt *Constitutional property clauses: A comparative analysis* (1999) 19. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 420.

same grey area previously referred to as regulatory taking or constructive expropriation.<sup>17</sup>

Even in jurisdictions that do recognise some form of constructive expropriation, a claim for compensation will not necessarily be successful simply because a regulatory infringement imposes an excessive or unfair deprivation on a property owner. Courts will only award compensation if a balancing of the interests of the affected owner and the public interest in the regulatory limitation indicates that compensation is required, considering all the relevant circumstances.<sup>18</sup> Van der Walt mentions three considerations that may diminish the likelihood of a compensation award, namely when the regulatory deprivation falls within the core police power function of protecting public health, safety and welfare; when the deprivation is exercised in terms of a power that is clearly and rationally distinct from the power of eminent domain; and when the regulation is not only substantively unfair but also procedurally unfair and flawed, in which case the correct remedy should be a declaration of invalidity and not a compensation award.<sup>19</sup> Moreover, Van der Walt highlights two factors that would increase the likelihood of compensation, namely when the state in fact acquires the affected property *or* some benefit from the process; and when the affected owner alone or a small group of property owners is unfairly singled out by the regulatory measure.<sup>20</sup>

The notion of regulatory takings was developed in the case law of the US Supreme Court. Although US law on this topic is complex and the age, structure and phraseology of the US Constitution do not compare easily with more recent

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<sup>17</sup> See the discussion on Swiss law below.

<sup>18</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 353.

<sup>19</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 353.

<sup>20</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 353-354.

constitutions, US law sets out the most comprehensive and authoritative arguments in favour of regulatory taking for that particular constitutional context.<sup>21</sup> In the context of the Irish Constitution the construction also works because of the terminology of the Irish text. Because of its explicit provision for material expropriation, the notion of something like constructive expropriation also fits in the context of the Swiss Constitution. However, outside of these contexts the doctrine of constructive expropriation is generally fraught with conceptual difficulties. Constructive expropriation is a controversial issue in the context of South African law and has not been authoritatively accepted or rejected by the courts. If constructive expropriation could be developed in South African law it might constitute a viable alternative to invalidating excessive regulatory measures that serve a necessary and important public purpose for constituting arbitrary deprivation of property as meant in section 25(1) of the Constitution. Regulatory deprivations that are categorised as constructive expropriation would require the payment of compensation even though they do not constitute formal expropriation.

## **2 Treating regulatory deprivation of property as constructive expropriation**

### *2 1 Comparative overview*

#### **2 1 1 Introduction**

All the jurisdictions that recognise some form of constructive expropriation share the same problem of identifying precisely when a regulation of property should be treated

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<sup>21</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 359.

as a constructive expropriation that requires compensation. The reason for the ambiguity is that the decision of whether to expropriate is taken from the legislature or the administration and given to the judges. Courts are called upon to decide which regulations should be viewed as uncompensated regulatory state interferences with property, even though they may render the affected property less useful or valuable to the owner, and which regulations should be viewed as effectively expropriating the property for public use that requires compensation.<sup>22</sup> The discussion below analyses the different approaches to constructive expropriation in US, Irish and Swiss law. The purpose of the comparative overview is to show how courts can sometimes salvage excessive regulatory interferences with property by treating them as a kind of expropriation that requires compensation (US and Switzerland), while that solution is not available in other jurisdictions (Ireland), with the result that invalidation is the only option. The overview also shows that the way in which courts can rely on some form of constructive expropriation depends largely on the constitutional text, the social and political context and the underlying legal tradition.

## **2 1 2 US law**

The notion of regulatory taking was developed in the case law of the US Supreme Court.<sup>23</sup> The Court adopted a complex doctrinal structure consisting of a series of tests to differentiate between a legitimate regulation and an unconstitutional taking of property.<sup>24</sup> According to the US case law, overarching principles of justice and fairness indicate when the burden imposed by regulatory measures exceed what

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<sup>22</sup> JL Sax "Land use regulation: Time to think about fairness" (2010) 50 *Natural Resources Journal* 455-470 at 456.

<sup>23</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 359.

<sup>24</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 677.

could legitimately be expected of property holders to bear without compensation. Factors that courts generally consider to determine whether compensation is payable for constructive expropriation include the extent of the economic impact on the property holder in relation to the public interest served by the regulatory measure; the extent to which the regulatory measure interfered with the property owner's investment-backed expectations; and the character of the state action. Although these factors overlap in the various jurisdictions that recognise constructive expropriation, the weight that is attached to each factor differs from jurisdiction to jurisdiction. This may be partially attributed to different degrees of constitutional protection of property.<sup>25</sup>

The Fifth Amendment to the US Constitution is also known as the takings clause.<sup>26</sup> One of the purposes of the takings clause is to prevent the state from forcing some people to bear a burden that ought to be shared by the public as a whole.<sup>27</sup> The term "taking" is not confined to formal expropriations, although such actions do constitute takings. Some regulatory state actions, known as "regulatory takings", that are substantively tantamount to expropriation are also included under the term "taking".<sup>28</sup> In addition to the Fifth Amendment, the Fourteenth Amendment, also known as the due process clause, protects owners from being deprived of

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<sup>25</sup> R Alterman "Comparative analysis: A platform in cross-national learning" in R Alterman (ed) *Takings international: A comparative perspective on land use regulations and compensation rights* (2010) chap 2 at 25.

<sup>26</sup> The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without compensation".

<sup>27</sup> *Armstrong v United States* 364 US 40 (1960) para 49. See also *Agins v City of Tiburon* 447 US 255 (1980) para 260.

<sup>28</sup> GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 71. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 676; K Gray "Can environmental regulation constitute a taking of property at common law?" (2007) 24 *Environmental and Planning Law Journal* 161-181 at 168-169.



property without due process.<sup>29</sup> The due process clause functions as a formal check on the procedure followed in imposing a restriction on the use of property and not as a substantive review of the reasons for the regulation.<sup>30</sup> A major difference between the due process clause and the takings clause is that takings are permissible as long as they are undertaken for a public purpose and with just compensation. On the other hand, state action may not infringe the due process clause, even if compensation is paid.<sup>31</sup>

The regulatory taking doctrine was first developed in *Pennsylvania Coal Co v Mahon*<sup>32</sup> (*Mahon*).<sup>33</sup> Prior to *Mahon*, the takings clause was narrowly interpreted to apply only to physical appropriations of property by the state in the exercise of its power of eminent domain.<sup>34</sup> However, in *Mahon* the Court extended the protection of the takings clause to exercises of regulatory power because it held that “[i]f ... the uses of private power were subject to unbridled, uncompensated qualification under the police power, ‘the natural tendency of human nature [would be] to extend the

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<sup>29</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 678. The Fourteenth Amendment provides that “... nor shall any state deprive any person of life, liberty, or property, without due process of law ...”.

<sup>30</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 355. A O’Neil “Property rights and the power of eminent domain” in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and values* (2008) chap 24 at 432 states that the just compensation requirement entrenched in the Fifth Amendment constitutes an essential element of due process as guaranteed by the Fourteenth Amendment of the US Constitution.

<sup>31</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 686. See also R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 18.

<sup>32</sup> 260 US 393 (1922) para 413.

<sup>33</sup> GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 71. See also R Lubens “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 394; WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 1.

<sup>34</sup> *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) para 1014. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 678-679, citing *Mugler v Kansas* 123 US 623 (1887) paras 668-670, arguing that laws enacted in good faith to protect the public safety cannot constitute unconstitutional takings of property, as long as they do not amount to an actual taking of private title or deprive the owner of possessory rights. LS Underkuffler-Freund “Takings and the nature of property” (1996) 9 *Canadian Journal of Law and Jurisprudence* 161-205 at 164 fn 14 states that the Supreme Court’s opinion in *Mugler v Kansas* 123 US 623 (1887) is generally considered to mark the beginning of modern takings law in the United States.

qualification more and more until at last private property disappears”.<sup>35</sup> The Court held that property rights are enjoyed under an implied limitation and must yield to the police power, but such implied limitation must have its limits.<sup>36</sup>

US takings law draws a distinction between the state’s police power to regulate the use of property for purposes of public health, welfare and safety on the one hand and its eminent domain power on the other.<sup>37</sup> With regard to the state’s police power, a distinction is drawn between public purposes which fall in the narrow sphere of police power regulation and those that do not. Public purposes that fall within the narrow sphere of police power regulation include the promotion of public health and safety, whilst public purposes such as planning, zoning and conservation laws fall outside the narrow sphere of police power regulation.<sup>38</sup> Police power regulation in the narrow sphere is not compensated regardless of the negative effect or impact it might have on a property holder and a lower level of judicial scrutiny is applied.<sup>39</sup> Outside the narrow sphere of regulatory action the impact or effect of the regulation becomes relevant, even when the purpose is legitimate and the due process requirements are complied with.<sup>40</sup> In the wider sphere of regulatory action the state’s police power and its power of eminent domain are seen as two opposites on a continuum and

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<sup>35</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) para 415.

<sup>36</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) para 413.

<sup>37</sup> B Ziff; J de Beer; DC Harris & ME McCallum *A property law reader: Cases, questions, & commentary* (3<sup>rd</sup> ed 2012) 146.

<sup>38</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 355; AJ van der Walt “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 *South African Public Law* 273-331 at 282-283.

<sup>39</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 681. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 355-356; AJ van der Walt “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 *South African Public Law* 273-331 at 282.

<sup>40</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 356; AJ van der Walt “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 *South African Public Law* 273-331 at 283.

compensation is required as soon as a weighing of private and public interest indicates that the regulation went too far.<sup>41</sup>

Although property rights are affected to some extent by regulatory measures in terms of the state's police power, not every such measure gives rise to compensation. The oft quoted statement by Justice Holmes in *Mahon* holds that

"[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So then the question depends upon the particular facts".<sup>42</sup>

Furthermore, the Supreme Court in *Mahon* stated as a general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking".<sup>43</sup> Unfortunately the Court did not precisely define when a given regulation would be seen as going "too far" for purposes of the takings clause. The main purpose of the statement in the *Mahon* decision was to show that there is some limit to the police power.<sup>44</sup> Heller and Krier interpret the Court's reference to the "extent of the diminution" as an implicit corollary that in most cases, where the loss is small there is no taking and therefore no compensation due.<sup>45</sup> Subsequently, in *Village of Euclid v Ambler Realty Co*<sup>46</sup> (*Euclid*) the Court qualified this statement when it decided that even very serious and substantial loss of property value can be

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<sup>41</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 356.

<sup>42</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) para 413.

<sup>43</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) para 415.

<sup>44</sup> WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 21.

<sup>45</sup> MA Heller & JE Krier "Deterrence and distribution in the law of takings" (1999) 112 *Harvard Law Review* 997-1025 at 1005.

<sup>46</sup> 272 US 365 (1926).

insufficient to trigger the just compensation requirement.<sup>47</sup> It is not an easy task to define what would constitute an unconstitutional taking unless compensation is required for it.<sup>48</sup>

An overview of takings jurisprudence highlights the courts' unwillingness to develop and apply a set formula for determining whether a regulation goes too far. In *Penn Central Transportation Co v New York City*<sup>49</sup> (*Penn Central*) the Supreme Court adopted a complex doctrinal structure that involves an *ad hoc* inquiry, having regard to a number of factors to differentiate between a legitimate regulation and an unconstitutional taking of property.<sup>50</sup> This preference for an *ad hoc* test rather than a set formula was influenced by the utilitarian argument of Michelman that the decision to recognise a duty to compensate should be based on efficiency considerations, namely that compensation should be required whenever it would promote efficient regulation.<sup>51</sup> The *ad hoc* inquiry, also known as the *Penn Central* balancing test,

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<sup>47</sup> MA Heller & JE Krier "Deterrence and distribution in the law of takings" (1999) 112 *Harvard Law Review* 997-1025 at 1005.

<sup>48</sup> In *Armstrong v United States* 364 US 40 (1960) para 10 the Supreme Court held that it is difficult to "draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable". See also *Penn Central Transportation Co v New York City* 438 US 104 (1978) para 123. RA Epstein "An outline of takings" (1986) 41 *University of Miami Law Review* 3-19 at 10 states that the line between regulation and taking of property is not principled but incoherent. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 359 states that the takings jurisprudence is often referred to as an incomprehensible muddle.

<sup>49</sup> 438 US 104 (1978) paras 124, 130-131.

<sup>50</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 677.

<sup>51</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 357, citing FI Michelman "Property, utility, and fairness: Comments on the ethical foundations of 'just compensation' law" (1967) 80 *Harvard Law Review* 1165-1258. MA Heller & JE Krier "Deterrence and distribution in the law of takings" (1999) 112 *Harvard Law Review* 997-1025 at 997-1013 make a similar argument that "efficiency" and "justice" are two considerations that underlie the takings clause. According to the authors, efficiency relates to the allocation of resources among various alternatives in ways that maximise value, whereas justice relates to the distribution of costs and benefits that result from particular allocations in ways that satisfy some equitable principle of fairness. In this regard, the just compensation requirement plays an important role in deterring the state from overusing its taking power. The authors distinguish between general and specific deterrence. General deterrence aims to prevent the state from taking resources without paying for them; whereas specific deterrence is aimed at constraining state inclinations to exploit politically vulnerable groups and individuals. However, deterrence and distribution are not always independent from each other. The interrelatedness is evident by the fact that the denial of compensation when justice would insist upon it would not only be unfair but inefficient as well. Furthermore, justice will sometimes require specific distribution to aggrieved individuals, even though no formal taking had occurred.

consists of consideration of three factors to determine whether a regulatory action constitutes a taking for purposes of the takings clause. These *ad hoc* factors are firstly, the economic impact of the regulation on the property owner; secondly, the extent to which the regulation has interfered with distinct investment-backed expectations; and thirdly, the character or extent of the state action.<sup>52</sup>

No uniform formula exists with regard to the application of these considerations. Therefore, the *ad hoc* determination results in uncertainty for both landowners and the state whenever regulatory takings are challenged in courts.<sup>53</sup> Fischel argues that the open ended balancing test runs the risk of balancing the just compensation clause out of the Constitution entirely.<sup>54</sup> Michelman points out that the Court had found the undefined, open-ended *ad hoc* balancing test hard to maintain and had therefore shifted towards a reformalisation of the takings doctrine in the sense of adopting a series of categorical takings.<sup>55</sup>

The Supreme Court identified a number of situations that are not governed by the *Penn Central* balancing test but by *per se* tests, known as “categorical takings”. Categorical takings are regulations of property that are invalid in the absence of compensation, regardless of the public purpose served by the regulation and without

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<sup>52</sup> *Penn Central Transportation Co v New York City* 438 US 104 (1978) paras 124, 130-131. See similar statements in *Kaiser Aetna v United States* 444 US 164 (1979) para 175; *Keystone Bituminous Coal Association v DeBenedictis* 480 US 470 (1987) paras 458, 488. See the discussion of the *ad hoc* factors in JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 687-688. See also R Lubens “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 395; WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 50-51.

<sup>53</sup> R Alterman “Conclusions: The US property rights debate viewed through cross-national lense” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 3 at 76.

<sup>54</sup> WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 52.

<sup>55</sup> F Michelman “Takings, 1987” (1988) 88 *Columbia Law Review* 1601-1629 at 1621-1622.

resort to the *Penn Central ad hoc* test.<sup>56</sup> If a court determines that the case before it does not meet the criteria for one of the categorical takings, the three-factor *ad hoc* test is applicable.<sup>57</sup> So far three special rules have been identified that constitute categorical takings, namely permanent physical invasions of property (regardless how trivial the impact of the infringement); deprivation of certain core property rights; and the deprivation of all economically viable use of the property.<sup>58</sup> Singer points out that each of these special rules has very strict and limited application and that policy considerations are relevant to determining when they are applicable.<sup>59</sup> In addition, the categorical rules themselves contain exceptions that limit the scope of their application.<sup>60</sup>

The first categorical rule holds that permanent physical invasions of property by the state will often, but not always, constitute a taking.<sup>61</sup> This test was first firmly articulated in *Loretto v Teleprompter Manhattan CATV Corp*<sup>62</sup> (*Loretto*). In *Loretto*, the Court held that the City of New York effected a taking by requiring lessors of residential property to permit the installation of cable television facilities on their buildings. In this case both the strength of the public interest and the overall impact on the property's value were considered irrelevant.<sup>63</sup> The Court held that the

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<sup>56</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 692. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 357-358.

<sup>57</sup> R Alterman "Comparative analysis: A platform in cross-national learning" in R Alterman (ed) *Takings international: A comparative perspective on land use regulations and compensation rights* (2010) chap 2 at 51. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 722.

<sup>58</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 692. See also F Michelman "Takings, 1987" (1988) 88 *Columbia Law Review* 1601-1629 at 1622.

<sup>59</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 692.

<sup>60</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 692.

<sup>61</sup> TE Roberts "United States" in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 222. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 693; F Michelman "Takings, 1987" (1988) 88 *Columbia Law Review* 1601-1629 at 1604.

<sup>62</sup> 458 US 419 (1982).

<sup>63</sup> TE Roberts "United States" in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 222. MA Heller & JE Krier "Deterrence



recognised property rights in a physical thing are the rights “to possess, use and dispose of it ... [and when] the government permanently occupies physical property, it effectively destroys *each* of these rights”.<sup>64</sup> Heller and Krier argue that the physical occupation rule cannot always be explained and reconciled with the efficiency and justice concerns underlying the takings clause, especially where courts extend the rule to cases in which both the burden and the number of individuals affected are minimal.<sup>65</sup> In these cases the affected property interests are small in aggregate and therefore efficiency considerations do not play a role; and the losses suffered are also so small that justice considerations do not come into play either.<sup>66</sup> Therefore compensation should not be payable.

However, not every permanent physical invasion of property will constitute a taking. In *Nollan v California Coastal Commission*<sup>67</sup> (*Nollan*), the Court indicated an exception to this rule.<sup>68</sup> A permanent physical invasion of property will not be treated as a taking if the state can show that a nexus exists between the foreseeable impact of the landowner’s proposed property development and the land exacted for public use.<sup>69</sup> In addition, the nexus must be proportionate to the foreseen impact of the

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and distribution in the law of takings” (1999) 112 *Harvard Law Review* 997-1025 at 1008 point out that the *de minimis* nature of the taking did not play a role in the Supreme Court’s view.

<sup>64</sup> *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) para 435.

<sup>65</sup> MA Heller & JE Krier “Deterrence and distribution in the law of takings” (1999) 112 *Harvard Law Review* 997-1025 at 1008.

<sup>66</sup> MA Heller & JE Krier “Deterrence and distribution in the law of takings” (1999) 112 *Harvard Law Review* 997-1025 at 1008. MJ Radin “The liberal conception of property: Cross currents in the jurisprudence of takings” (1988) 88 *Columbia Law Review* 1667-1696 at 1987-1988 states that the *Loretto* decision exacerbates the paradox of takings jurisprudence that owners may suffer a significant loss in property value without being considered to constitute a taking requiring compensation, whereas if the courts decide to characterise the state action as a physical occupation, a taking will be established even if the loss or inconvenience to the owner is miniscule.

<sup>67</sup> 483 US 825 (1987).

<sup>68</sup> TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 222-223. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 694-702 for a discussion of other exceptions to the *Loretto* rule that developed in case law.

<sup>69</sup> TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 222. See also F Michelman “Takings,



development.<sup>70</sup> The courts will in these instances not defer to the state's assertion of a nexus. The Courts approach is commendable since close scrutiny of the connection between ends and means of land use regulations will prevent regulations in terms of the state's police power, which are usually uncompensated, from becoming a substitute for eminent domain.

With regard to the second categorical rule, only two core property rights that would result in a taking if the property owner is deprived of them have been identified by courts, namely the right to exclude (which is effectively taken by permanent physical invasions of property) and the right to pass on property at death. In *Kaiser Aetna v United States*<sup>71</sup> the Court held that the right to exclude is "universally held to be a fundamental element of the property right" and that the state cannot take it without compensation.<sup>72</sup> Moreover, in *Hodel, Secretary of the Interior v Irvin*<sup>73</sup> (*Hodel*) the Court held that the relevant regulation in effect abrogated the right to pass on a certain type of property to one's heirs and this right has been part of the Anglo-American legal system since feudal times.<sup>74</sup> According to the Court, a total abrogation of these rights cannot be upheld.<sup>75</sup> Singer states that the Supreme Court

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1987" (1988) 88 *Columbia Law Review* 1601-1629 at 1606-1607; MA Heller & JE Krier "Deterrence and distribution in the law of takings" (1999) 112 *Harvard Law Review* 997-1025 at 1024. R Lubens "The social obligation of property ownership: A comparison of German and US law" (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 397 states that the increased judicial scrutiny approach to the means-end analysis of land-use regulation adopted in the *Nollan* decision is greater than that applicable in the due process analysis.

<sup>70</sup> TE Roberts "United States" in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 223.

<sup>71</sup> 444 US 164 (1979).

<sup>72</sup> *Kaiser Aetna v United States* 444 US 164 (1979) paras 179-180.

<sup>73</sup> 481 US 704 (1987).

<sup>74</sup> *Hodel, Secretary of the Interior v Irvin* 481 US 704 (1987) para 716.

<sup>75</sup> *Hodel, Secretary of the Interior v Irvin* 481 US 704 (1987) para 717.

has rejected arguments to the effect that other entitlements are “core” rights whose infringement is *per se* unconstitutional without compensation.<sup>76</sup>

The third categorical rule was developed in *Lucas v South Carolina Coastal Council*<sup>77</sup> (*Lucas*), which dealt with a regulation that prevented the owner of beachfront property to build on his land and consequently rendered the landowner’s property valueless. The Supreme Court held that a taking occurs where a regulation deprives a landowner of all economically viable use of his property.<sup>78</sup> According to the Court, one justification for this rule is that depriving an owner of all economic use of the property has the same effect as a permanent physical invasion.<sup>79</sup> However, the Court qualified the categorical nature of the rule, holding that the state will be exempt from paying compensation if it can show that the particular property use was never part of the owner’s right in the first place.<sup>80</sup> The rationale behind this qualification is that no owner has the right to use his property in an unlawful manner. It is very difficult to succeed with a regulatory takings claim on this ground. In *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency*<sup>81</sup> (*Tahoe*), the Court held that anything less than a “complete elimination of value” or “total loss” is insufficient to invoke this *per se* rule.<sup>82</sup>

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<sup>76</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 704.

<sup>77</sup> 505 US 1003 (1992).

<sup>78</sup> *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) para 1015.

<sup>79</sup> *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) para 1017. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 351 fn 56.

<sup>80</sup> TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 217. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 728.

<sup>81</sup> 535 US 302 (2002).

<sup>82</sup> *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* 535 US 302 (2002) para 330. See also TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 217.

Regulatory interferences that do not qualify as categorical takings will be assessed in terms of the *ad hoc* test set out in *Penn Central*. With regard to the third *ad hoc* consideration, namely the nature of the state action, Singer succinctly identified a few regulatory interferences that result from legitimate exercises of the police power that need not be compensated.<sup>83</sup> These instances include a regulation of property use rather than a forced physical invasion; a restriction designed to protect the community from harm, or to respond to externalities caused by the property owner's use of the property rather than extraction of a benefit for the community for which the owner should receive compensation;<sup>84</sup> regulations that

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<sup>83</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 724.

<sup>84</sup> This is also known as the "nuisance" or "noxious use" exception. F Michelman "Takings, 1987" (1988) 88 *Columbia Law Review* 1601-1629 at 1603 explains that the regulation of uses that are generally classified as socially harmful or nuisance-like cannot be considered "takings" irrespective of the special onerous consequences it may have for the affected property holder. See also R Lubens "The social obligation of property ownership: A comparison of German and US law" (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 392; WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 22-24; MA Heller & JE Krier "Deterrence and distribution in the law of takings" (1999) 112 *Harvard Law Review* 997-1025 at 1010. Heller and Krier point out that although nuisance law is best considered as an efficiency-enhancing measure, the conventional takings law treatment of nuisances does not necessarily promote fair results. The authors illustrate the fact that unfairness may result from the noxious use exception on the basis of two decisions. In *Hadacheck v Sebastian* 239 US 394 (1915) the property owner purchased property that contained a bed of clay for purposes of making high quality bricks. The brickyard was outside the city limits, far away from any residences and completely lawful at the time it was established. The city had subsequently grown and residences were built around the brickyard, the operation of which had become a nuisance. The city consequently enacted legislation that put the property owner out of business. The legislation was challenged on the basis that it authorised an uncompensated taking of property but the Supreme Court upheld the legislation, holding that it was a valid exercise of police power and therefore no compensation was due. Furthermore, the Court held that no one could have a vested right to commit a nuisance (despite the fact that the neighbours had come to the nuisance). Another example of the unfairness that may result from the noxious use exception is *Miller v Schoene* 276 US 272 (1928). This case dealt with a statute that mandated the felling and destruction of a large number of ornamental red cedar trees without compensation because they produced cedar rust fatal to apple trees cultivated nearby. The Supreme Court pointed out that apple growing was one of the principal agricultural pursuits in that particular state. Moreover, the Court concluded that the state had not exceeded its constitutional powers by deciding to destroy one class of property without compensation in order to save another, which it regarded of greater value to the public. Heller and Krier argue that both cases are no doubt efficient but it was hardly fair in the absence of compensation. For a discussion of the two decisions see MA Heller & JE Krier "Deterrence and distribution in the law of takings" (1999) 112 *Harvard Law Review* 997-1025 at 1009-1011; JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 679-680, 686-687. WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 61 argues that the nuisance exception may be a sensible rule but it begs the question of who decides what constitutes a nuisance.

restrict certain uses of property but also reciprocally benefit the affected property owners;<sup>85</sup> and regulations aimed at solving civil disputes.<sup>86</sup>

In terms of the first *ad hoc* consideration, namely the economic impact of the regulation on a property holder, courts have affirmed that this requires a balancing of the conflicting private and public interests. This weighing of interests approach holds that the greater the diminution in value, the more compelling the state's interest must be to justify the diminution.<sup>87</sup> Regulation is less likely to be considered a taking if the diminution in value is minimal.<sup>88</sup> In *Agins v City of Tiburon*<sup>89</sup> (*Agins*) the Court stated that regulation that "does not substantially advance legitimate state interests or denies an owner economically viable use of his land" will constitute an unconstitutional taking.<sup>90</sup> Singer argues that although this phrase suggests that regulation should not only be rationally related to but also substantially advance legitimate state interests, courts have not to date struck down legislation on the ground that it did not "substantially" advance legitimate state interests.<sup>91</sup> Instead, courts defer to the legislature's judgment that the law will advance those interests.<sup>92</sup> However, in *Lingle v Chevron, USA, Inc*<sup>93</sup> the Court held that the "substantially advances" means-end consideration is relevant under the due process clause and

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<sup>85</sup> WA Fischel *Regulatory takings: Law, economics, and politics* (1995) 56-57.

<sup>86</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 724.

<sup>87</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 727.

<sup>88</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 728.

<sup>89</sup> 447 US 255 (1980).

<sup>90</sup> *Agins v City of Tiburon* 447 US 255 (1980) para 260.

<sup>91</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 690-691.

<sup>92</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 691.

<sup>93</sup> 544 US 528 (2005).

should be considered prior to a takings claim, since if a law fails to promote a legitimate end, that is the end of the matter.<sup>94</sup>

With regard to the second *ad hoc* consideration, namely “investment-backed expectations”, the Court held in *Penn Central* that owners are not entitled to the “most beneficial use” of their property.<sup>95</sup> The dilemma regarding conflicts between the regulation and the protection of property rights is that, on the one hand, property owners must be able to rely on the law as it stands at the time they invest, otherwise constitutional property protection will be meaningless. On the other hand, the state should also have the power to change the law, otherwise it would not be able to protect the public welfare.<sup>96</sup> Property owners can therefore not expect the law to remain unchanged or expect compensation for every change that affects their pre-existing rights.<sup>97</sup> However, purchasing property with knowledge that the use of the land is already restricted, for instance by zoning or building legislation, does not automatically bar a claim for compensation.<sup>98</sup> One of the factors that are taken into

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<sup>94</sup> TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 220-221.

<sup>95</sup> *Penn Central Transportation Co v New York City* 438 US 104 (1978) paras 125, 127. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 690.

<sup>96</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 729. B Ziff “Taking’ liberties: Protections for private property in Canada” in E Cooke (ed) *Modern studies in property law* (2005) 341-360 at 349 states that an entrenched provision for compensation in the takings clause provides insurance to owners that they will have some recourse should their property be confiscated by the authorities. The law therefore protects reasonable investment-backed expectations.

<sup>97</sup> TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 119 argues that landowners must take the regulatory climate surrounding the intended use of the property into account. CM Rose “Property and expropriation: Themes and variations in American law” (2000) 38 *Utah Law Review* 1-38 at 22-23 states that legal institutions have required that property owners adjust their expectations to incorporate regulatory changes that are part of the logic of managing scarce resources.

<sup>98</sup> TE Roberts “United States” in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 220.

account when assessing investment-backed expectations is whether the landowner had prior knowledge of such restrictions when acquiring the land.<sup>99</sup>

Eagle argues that the *Penn Central* balancing test might never have been intended to express a set of tests with objective criteria but rather intended to provide some protection to landowners deemed unfairly harmed by changes in land use regulations.<sup>100</sup> Furthermore, each of the factors of the *Penn Central* balancing test depends on the others for content and meaning.<sup>101</sup> According to Eagle, the *Penn Central* balancing test does not have a firm grounding in property law or substantive due process and therefore it conjectures upon claimants expectations regarding what they owned, together with inherently subjective notions of fairness.<sup>102</sup> This, together with the absence of objective criteria in the *Penn Central* balancing test creates legal uncertainty for both property owners and the state regarding their respective rights and obligations and results in protracted litigation and arbitrary outcomes.<sup>103</sup> Therefore, there is a constant tension in takings law between the usual *ad hoc* balancing approach to resolving takings cases and the *per se* categorical takings.<sup>104</sup> Property holders try to shoehorn their cases into the existing *per se* rules to avoid the

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<sup>99</sup> TE Roberts "United States" in R Alterman (ed) *Takings international: A comparative perspective on land use regulation and compensation rights* (2010) chap 11 at 220. See *Palazzolo v Rhode Island* 533 US 606 (2001). See also the discussion in JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 716-717.

<sup>100</sup> SJ Eagle "The four-factor *Penn Central* regulatory takings test" (2014) 118 *Penn State Law Review* 601-646 at 602.

<sup>101</sup> SJ Eagle "The four-factor *Penn Central* regulatory takings test" (2014) 118 *Penn State Law Review* 601-646 at 604.

<sup>102</sup> SJ Eagle "The four-factor *Penn Central* regulatory takings test" (2014) 118 *Penn State Law Review* 601-646 at 604.

<sup>103</sup> SJ Eagle "The four-factor *Penn Central* regulatory takings test" (2014) 118 *Penn State Law Review* 601-646 at 605.

<sup>104</sup> R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 105.



unpredictability of the *ad hoc* balancing tests.<sup>105</sup> This creates expansionary pressure on the existing *per se* categories. However, it is doubtful that courts will go further than they have already in embracing *per se* taking rules.<sup>106</sup> Although they provide greater certainty, it is at the price of reduced sensitivity to individual circumstances. Such sensitivity is the very hallmark of takings law.<sup>107</sup>

The case law on regulatory takings is extremely complex. Academic authors often comment that it is incomprehensible. Heller and Krier state that the courts have “turned the words of the Takings Clause into a cryptogram that only the Justices in a given case are able to decipher (and seldom do all of them agree)”.<sup>108</sup> Sax points out the Supreme Court’s varied approach to regulatory takings, focusing on relatively objective rules such as the degree of the economic loss to the owner, while at other times adopting more open-ended standards which leave a wide margin of discretion to the presiding judge of the case at hand.<sup>109</sup> Furthermore, Sax argues that the Supreme Court has not settled on a satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem.<sup>110</sup> Poirier states

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<sup>105</sup> R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 9 state that the landowner generally lose in the majority of the cases in which the *ad hoc* balancing test is applied.

<sup>106</sup> R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 105.

<sup>107</sup> R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 105. MJ Radin “The liberal conception of property: Cross currents in the jurisprudence of takings” (1988) 88 *Columbia Law Review* 1667-1696 at 1672, 1988 argues that the Supreme Court should abandon the *per se* rules and return to the question of whether it is fair to expect the citizen to bear the cost that result from a particular regulatory infringement for the benefit of the public. Furthermore, Radin argues that the balancing test is more pragmatic since it requires a case-by-case analysis; the question whether or not the state action can be characterized as a physical invasion of property is only one of the significant factors to be weighed.

<sup>108</sup> MA Heller & JE Krier “Deterrence and distribution in the law of takings” (1999) 112 *Harvard Law Review* 997-1025 at 1023-1024 state that the mess is hardly surprising since with time values, politics and personalities change, which results in different views among the members of the Court.

<sup>109</sup> JL Sax “Land use regulation: Time to think about fairness” (2010) 50 *Natural Resources Journal* 455-470 at 456.

<sup>110</sup> JL Sax “Takings and the police power” (1964) 74 *Yale Law Journal* 36-76 at 46.



that the vagueness in the takings doctrine may well reflect a deeply ingrained societal disagreement about the nature of private property and the role of government.<sup>111</sup> Poirier states that the notion of property is heterogeneous and this in itself accounts for at least some of the difficulty in providing clear rules for the doctrine of regulatory takings.<sup>112</sup> Lubens argues that US jurisprudence does not regard property as a fundamental right and as such, US courts do not scrutinise property regulation to the same degree as non-economic civil liberties such as freedom of speech, freedom of association, or freedom of religion.<sup>113</sup> Property rights are subject to any measure that passes a weak “rationality” standard of judicial review.<sup>114</sup> Although property rights have gained greater protection under the takings clause over time, “the decisions hailed by property rights partisans and property owners as paradigm-shifting victories [continues to be] doctrinally cautious and often limited in application”.<sup>115</sup>

According to Singer, the ultimate question in takings claims is found in the Court’s statement in *Armstrong v United States*<sup>116</sup> that the takings clause is aimed at preventing the state from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”.<sup>117</sup> According to Sax, the Fifth Amendment was designed to prevent arbitrary state action and considered to constitute “a bulwark against unfairness, rather than against mere

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<sup>111</sup> MR Poirier “The virtue of vagueness in takings doctrine” (2002) 24 *Cardozo Law Review* 93-191 at 100.

<sup>112</sup> MR Poirier “The virtue of vagueness in takings doctrine” (2002) 24 *Cardozo Law Review* 93-191 at 124.

<sup>113</sup> R Lubens “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 414.

<sup>114</sup> R Lubens “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 414-415.

<sup>115</sup> R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 9. See also R Lubens “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 at 415.

<sup>116</sup> 364 US 40 (1960).

<sup>117</sup> *Armstrong v United States* 364 US 40 (1960) para 49. See also JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 730.

value diminution”.<sup>118</sup> The duty to pay compensation plays an important role in this regard. According to Sax, compensation protects private property owners against arbitrary, unfair or tyrannical state actions.<sup>119</sup> Considerations of fairness and justice are the determinative criteria by which courts distinguish between constitutional regulations and unconstitutional takings.<sup>120</sup> However, what is fair and just depends on various things.<sup>121</sup> In this regard, some authors argue that these situations are best dealt with by appropriate legislative measures.<sup>122</sup>

The doctrine of regulatory takings is one solution to save the type of excessive regulatory measures discussed in chapter 1 from being declared invalid. In terms of the US doctrine of regulatory takings, courts treat an interference with property rights, which was effected in terms of the state’s police power, as a taking which requires compensation if the court determines that the impact of such regulatory measure is so harsh and excessive that it cannot be upheld without compensation. Therefore, the doctrine of regulatory takings allows courts to uphold excessive regulatory measures by treating them as expropriation of property that requires the payment of compensation, even though the state did not intend to formally expropriate the affected property holder.

Despite reservations on the appropriateness of regulatory takings solution for South African law in light of the judicial controversy and difficulty in determining when a regulatory measure constitutes regulatory taking which requires compensation, the

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<sup>118</sup> JL Sax “Takings and the police power” (1964) 74 *Yale Law Journal* 36-76 at 57-58.

<sup>119</sup> JL Sax “Takings and the police power” (1964) 74 *Yale Law Journal* 36-76 at 64.

<sup>120</sup> JW Singer *Introduction to property* (2<sup>nd</sup> ed 2005) 677. See also JL Sax “Land use regulation: Time to think about fairness” (2010) 50 *Natural Resources Journal* 455-470 at 467; R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 103.

<sup>121</sup> R Meltz; DH Merriam & RM Frank *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 104.

<sup>122</sup> MA Heller & JE Krier “Deterrence and distribution in the law of takings” (1999) 112 *Harvard Law Review* 997-1025 at 1013.

phraseology of the US property clause may make this solution unique to the US law context. The Fifth Amendment refers to “takings” of property which is wider than “expropriation”. The term taking is not limited to state acquisitions of property but also includes regulatory state actions that effect a burden that is tantamount to expropriation of property. However, in light of the South African Constitutional Court’s recent ruling in *Agri SA* regarding state acquisition as a requirement for expropriation, it seems unlikely that constructive expropriation can be recognised in South African law.<sup>123</sup>

### **2 1 3 Irish law**

The constitutional property clause in the Irish Constitution is interesting for this comparative overview because the meaning of this uniquely phrased provision has also by and large been developed in the jurisprudence, but with an outcome that differs significantly from its American counterpart. Articles 40.3.2 and 43 constitute the property clause in the Constitution of Ireland 1937 (Irish Constitution).<sup>124</sup> The precise relationship between these two articles is unclear but current jurisprudence

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<sup>123</sup> See the discussion on South African law below.

<sup>124</sup> Section 40.3.2 provides that “[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”. The Irish Constitution is available at <http://www.irishstatutebook.ie/en/constitution/index.html#article40> (accessed on 01.08.2014). Furthermore section 43 states that:

“1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.  
1.2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.  
2.1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.  
2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.”

The Irish Constitution is available at <http://www.irishstatutebook.ie/en/constitution/index.html#article43> (accessed on 01.08.2014).

generally accepts that they serve as a double guarantee in the protection of property rights.<sup>125</sup> Article 40.3.2 guarantees protection from “unjust attack” on property whilst article 43.2 provides that the state may regulate property according to the principles of social justice. Furthermore, article 43.2 authorises the state to delimit by law, as occasion may require, the exercise of property rights with a view to reconcile their exercise with the exigencies of the common good.<sup>126</sup> The open-textured constitutional principles of “social justice” and the “exigencies of the common good” in article 43 are judicially interpreted and differentiated on the basis that the principles of social justice are relevant in determining whether the *reasons* advanced for the limitation can justify the restriction on the exercise of property rights. On the other hand, considering the exigencies of the common good focuses on the *means* that could be adopted to achieve socially-just public objectives.<sup>127</sup> Van der Walt argues that the requirements in article 43.2 contain both formal and normative aspects.<sup>128</sup> The formal aspects contained in article 43.2 require that the limitation must be authorised by law and must not be applied arbitrarily. The normative aspects relate to the fact that the limitation must reconcile the exercise of rights with the exigencies of the common good, which may imply some form of proportionality test to ensure that the limitation maintains a fair balance between the individual property holder’s

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<sup>125</sup> *Blake v The Attorney General* [1982] IR 117; *Re Article 26 and Part V of the Planning and Development Bill, 1999* [2000] 2 IR 321. See R Walsh *Private property rights in the Irish Constitution* (2011) 99-123 for a discussion on the relationship between article 40.3.2 and article 43; A O’Neil “Property rights and the power of eminent domain” in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and values* (2008) chap 24 at 436-437. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 231.

<sup>126</sup> AJ van der Walt “The protection of private property under the Irish Constitution: A comparative and theoretical perspective” in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and values* (2008) chap 22 at 398 states that the Irish property clause, similar to its German and South African counterparts, does not only protect property holdings but also actively promotes social welfare.

<sup>127</sup> *John E Shirley and Others v AO Gorman and Others* [2006] IEHC 27. See also the discussion of this case in R Walsh *Private property rights in the Irish Constitution* (2011) 112.

<sup>128</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 236.

interests and the public interest.<sup>129</sup> According to case law, article 40.3.2 and article 43 should be read together.<sup>130</sup> Walsh's analysis of case law on the relationship between these two articles leads to the conclusion that property as an institution is protected by article 43.1 and the rights flowing from ownership are secured against unjust attack by article 40.3.2, but this security is qualified by the state's power to regulate the exercise of property rights in terms of article 43.2.<sup>131</sup>

The Irish Constitution does not explicitly distinguish between deprivation and expropriation of property. The state's power in terms of article 43.2 includes both formal expropriation and the (uncompensated) regulation of property rights.<sup>132</sup> Moreover, the term "unjust attack" in article 40.3.2 does not only refer to expropriation but also includes regulatory interferences with property that amount to expropriation without compensation.<sup>133</sup> Therefore, an interference with property rights can constitute an unjust attack on property rights if it does not comply with the formal requirements of law (therefore not being authorised and consequently invalid) or if the impact of the regulatory measure is so extensive and disproportionate that it cannot be upheld without compensation. Therefore, in some instances, the absence

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<sup>129</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 236. See also R Walsh *Private property rights in the Irish Constitution* (2011) 112; J Casey *Constitutional law in Ireland* (3<sup>rd</sup> ed 2000) 677.

<sup>130</sup> *Dreher v Irish Land Commission* [1984] ILRM 94; followed in *Electricity Supply Board v Gormley* [1985] IR 129. See also G Hogan & G Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) 1993; J Casey *Constitutional law in Ireland* (3<sup>rd</sup> ed 2000) 677; AJ van der Walt "The protection of private property under the Irish Constitution: A comparative and theoretical perspective" in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and values* (2008) chap 22 at 401-402; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 234.

<sup>131</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 122. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 236 states that regulatory measures that do not comply with the requirements of article 43.2 should generally be regarded as an unjust attack in terms of article 40.3.2. See also AJ van der Walt "The protection of private property under the Irish Constitution: A comparative and theoretical perspective" in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and values* (2008) chap 22 at 402.

<sup>132</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 237, 239. See also R Walsh "The Constitution, property rights and proportionality: A reappraisal" (2009) 31 *Dublin University Law Journal* 1-34 at 16 fn 78, 20.

<sup>133</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 237, 239. See also R Walsh "The Constitution, property rights and proportionality: A reappraisal" (2009) 31 *Dublin University Law Journal* 1-34 at 6, 12-13.

of compensation can constitute a ground for claiming an unjust attack on property rights and result in invalidity of the regulatory measure. It is difficult to identify the precise location of the threshold where regulation shades into regulatory taking.<sup>134</sup> Various factors are taken into account when determining whether an unjust attack has occurred, namely retrospectivity; lack of fair procedures; unreasonableness and irrationality; discrimination; lack of proportionality; and in some cases, the lack of compensation.<sup>135</sup> The focus in this overview is on fairness in the distribution of regulatory burdens and the absence of compensation.

The principle of equality plays an important role in curtailing the state's regulatory power.<sup>136</sup> Regulatory measures that unfairly concentrate the cost of attaining a public benefit on a discrete category of individuals will usually be struck down if the principle of fairness indicates that these costs should rather have been spread evenly across society by paying compensation.<sup>137</sup> The constitutional source of this limit is unclear, since there is no indication in article 40.3.2 or article 43 of this principle.<sup>138</sup> In some cases, the impact on the affected owner is given substantial weight in determining whether an unjust attack has occurred, while in other cases the importance of the public interest at stake outweighs considerations of the excessive or disproportionate impact of the measure.<sup>139</sup> Walsh states that there is no clear

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<sup>134</sup> K Gray "Can environmental regulation constitute a taking of property at common law?" (2007) 24 *Environmental and Planning Law Journal* 161-181 at 175.

<sup>135</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 184, citing *J & J Haire and Company Ltd v Minister for Health* [2009] IEHC 562. For a discussion on each of these factors, see R Walsh *Private property rights in the Irish Constitution* (2011) 184-233; G Hogan & G Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) 1996-2011.

<sup>136</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 203.

<sup>137</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 204. R Walsh "The Constitution, property rights and proportionality: A reappraisal" (2009) 31 *Dublin University Law Journal* 1-34 at 31, citing *Re Article 26 of the Constitution and the Health (Amendment) (No 2) Bill, 2004* [2005] IESC 7, states that it is constitutionally unacceptable to expect a particularly vulnerable group within society to carry the cost of achieving a general social good.

<sup>138</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 209.

<sup>139</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 204.



distinction between permissible and impermissible distributions and that the “intuitive sense of fairness held by the deciding judges appears to be driving the doctrine, rather than any constraining principle”.<sup>140</sup>

Furthermore, not all regulatory measures that impose the costs of public benefits on discrete groups in society will be unjust. Various qualifications to the general principle that social costs should be fairly distributed among society as a whole have emerged from case law.<sup>141</sup> One such qualification is based on a profit-making rationale, also referred to as the harm-benefit distinction, in terms of which the person responsible for the creation of a social harm may be required to pay for its resolution since it would be unjust if such person were allowed to take the profits and let society carry the costs.<sup>142</sup> Generally, individuals cannot be required to pay for social costs that do not result from some harm they caused,<sup>143</sup> but the justification for the harm-benefit qualification lies in the fact that the burden imposed by the regulatory system is balanced by the benefits that accrue to an individual within such a system.<sup>144</sup> Walsh points out that this distinction is often used to support decisions upholding, rather than striking down, restrictions on the exercise of property rights.<sup>145</sup> The harm-benefit distinction depends on a prior understanding of property rights that

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<sup>140</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 204, 209.

<sup>141</sup> See R Walsh *Private property rights in the Irish Constitution* (2011) 204-230 for a discussion on the qualifications that have developed in Irish case law.

<sup>142</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 209-210, 216-219 lists examples of instances where this qualification may apply, namely a polluter may be required to pay for pollution-remediation; or an industrialist must ensure a safe workplace. Furthermore, examples of these instances are not limited to cases where legislation authorises the kind of activity. See also G Hogan & G Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) 2003; K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 164 fn 19. This corresponds to US law where the state is allowed to restrict the use of property without paying compensation if the restriction is imposed to respond to externalities caused by the property owner’s use of the property. Exactions is one example where this principle is applicable. See the discussion of regulatory takings in US law above.

<sup>143</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 210. See also G Hogan & G Whyte *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) 2003.

<sup>144</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 220.

<sup>145</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 219, 222



can ordinarily be asserted without any question of harm-creating arising.<sup>146</sup> This distinction is not always easy to make. Walsh argues that cases decided on the harm-benefit distinction are in reality decided in terms of the “deciding judge’s sense of fairness and on an unarticulated understanding of the value and content of a minimum core of rights that an owner is regarded as entitled to exercise regardless of their impact on the rights of others or on the common good”.<sup>147</sup> In addition to the harm-benefit qualification, which excludes compensation when an additional burden that is imposed on a property owner is justified by the fact that the burden is intended to balance out a harm caused by the owner’s use of the property, the possibility of claiming compensation is also qualified when a regulatory burden imposed on property owners is balanced out by other more or less reciprocal benefits.<sup>148</sup> Furthermore, a claim for a compensable infringement of property will rarely succeed if it can be shown that the affected owner is left with a residue of reasonable alternative use of his property.<sup>149</sup>

Although the Irish Constitution does not distinguish between deprivation and expropriation of property, case law reveals that the legislature has greater freedom to regulate the use of property than it has to appropriate rights, even though the restriction on the exercise of an owner’s property rights may result in a substantial

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<sup>146</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 210, citing FI Michelman “Property, utility, and fairness: Comments on the ethical foundations of ‘just compensation’ law” (1967) 80 *Harvard Law Review* 1165-1258 at 1197, states that “a benchmark of ‘neutral’ conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation)”.

<sup>147</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 211, 222.

<sup>148</sup> With regard to environmental regulation, K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 163, referring to the position in common law jurisdictions, states that it is arguable whether an affected owner suffers a loss since the public benefit of the regulation secures an “average reciprocity of advantage” and therefore a dimension of compensation is already inherent in the regulatory mechanism.

<sup>149</sup> K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 177. See also R Walsh “The Constitution, property rights and proportionality: A reappraisal” (2009) 31 *Dublin University Law Journal* 1-34 at 26.

adverse loss of value.<sup>150</sup> The unique terminology of the Irish property clause allows courts to treat excessive regulatory interferences with property as an unjust attack if it is not accompanied by compensation. However, not every regulatory limitation that results in the decline in value of the affected property will constitute a compensable infringement of property.<sup>151</sup> In *Central Dublin Development Association v Attorney General*<sup>152</sup> (*Central Dublin*) the Irish Supreme Court held that “some restrictions on the exercise of some of the rights that together constitute ownership do not call for compensation because the restriction is not an unjust attack”.<sup>153</sup> Similarly, in *M & F Quirke & Sons v An Bord Pleanála*<sup>154</sup> the Supreme Court stated that

“not all interferences with property rights will require compensation to be paid to ensure constitutional legitimacy. Compensation will be required in circumstances where property is wholly expropriated or where the bundle of rights which constitute ownership are substantially taken away but lesser interferences with property rights would not require compensation”.<sup>155</sup>

Expropriation or regulatory measures that appropriate or restrict property rights in total will almost always require compensation in order to be constitutional, but in cases that fall short of full appropriation, it is a matter of degree whether compensation will be a validity requirement.<sup>156</sup> Contrary to the civil law tradition, acquisition of title is not a requirement for an interference to constitute a taking (and a

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<sup>150</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 251 argues that this creates an incentive for the legislature to stretch the boundaries of regulation to achieve legislative goals.

<sup>151</sup> K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 174. Gray’s article is based on the approach followed in common law jurisdictions.

<sup>152</sup> [1975] 109 ILTR 69 at 84.

<sup>153</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 247-248, 253. See also R Walsh “The Constitution, property rights and proportionality: A reappraisal” (2009) 31 *Dublin University Law Journal* 1-34 at 12-13.

<sup>154</sup> [2010] 2 ILRM 91 at 110.

<sup>155</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 247-248, 253.

<sup>156</sup> K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 167, with reference to common law jurisdictions, states that a regulatory limitation may amount to a regulatory taking requiring compensation where such interference results in the removal of all reasonable uses of the affected property.

concomitant duty to compensate) in Irish law.<sup>157</sup> In *Re Article 26 of the Constitution and the Health (Amendment) (No 2) Bill, 2004*<sup>158</sup> the Supreme Court stated that

“where an Act of the Oireachtas [Parliament] interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it constitutes an ‘unjust attack’ on those rights and that in practice substantial encroachment on rights, without compensation, will rarely be justified”.

Moreover, a compensable infringement is more easily established when the regulatory limitation causes a substantial interference with the incidents of ownership rather than the loss of economic value.<sup>159</sup> Walsh argues that courts pay relatively little regard to the actual extent of the impact of the restriction on the value of the affected property rights, and focus instead on the nature of the restriction.<sup>160</sup> Therefore, restrictions that constitute appropriation of the total rights in the affected property, as opposed to restrictions that result from regulation of the exercise of property rights, would more readily be held to constitute an unjust attack on property in the absence of compensation. Furthermore, with regard to regulatory limitations of property, Walsh states that the entitlement to compensation is largely determined by

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<sup>157</sup> K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 173, citing *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 13 in which the Northern Ireland Court of Appeal held, with reference to the trend in US law, that “there may be a taking of property for which just compensation is payable though the taking is not a taking over but a taking away, as by a prohibition or restriction or some other form of interference”.

<sup>158</sup> [2005] IESC 7 at 31-32. See also D O’Donne “Property rights in the Irish Constitution: Rights for rich people, or a pillar for free society?” in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and values* (2008) chap 23 at 426-427.

<sup>159</sup> K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161-181 at 174 (footnotes omitted), referring to common law jurisdictions. See also J Casey *Constitutional law in Ireland* (3<sup>rd</sup> ed 2000) 678.

<sup>160</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 253. See also R Walsh “The Constitution, property rights and proportionality: A reappraisal” (2009) 31 *Dublin University Law Journal* 1-34 at 3, 26.

the public interest furthered by the particular regulatory measure rather than by reference to the extent of the impact of the restriction on property rights.<sup>161</sup>

The term “unjust attack” is unique to the Irish property clause and allows courts to treat interferences with property rights that result from a regulatory measure as something similar to regulatory takings in US law. Although Irish law does not adopt the US regulatory takings doctrine in the strict sense, excessive regulatory measure may in some instances be declared invalid if they are not accompanied by compensation. Stated differently, Irish law requires the state, in some instances, to provide compensation to individual property owners who have to bear a regulatory burden for the benefit of the public as a whole, even though the state did not formally expropriate the affected property owner’s property. However, in the absence of a regulatory takings doctrine compensation does not amount to regulatory excess being salvaged by way of requiring compensation. In instances where the considerations set out above do not indicate that compensation is required, compensation cannot achieve anything and the remedy for regulatory excess remains invalidation.

With regard to the impact of a regulatory interference with property, in light of the absence of a distinction between deprivation and expropriation in the Irish property clause, it is a matter of degree whether compensation is required for the validity of a specific regulatory interference. An excessive regulatory measure will constitute unjust attack on property rights if such regulatory measure is not accompanied by compensation.<sup>162</sup> In light of the explicit distinction between

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<sup>161</sup> R Walsh “The Constitution, property rights and proportionality: A reappraisal” (2009) 31 *Dublin University Law Journal* 1-34 at 26.

<sup>162</sup> R Walsh *Private property rights in the Irish Constitution* (2011) 235. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 237-238; K Gray “Can environmental

deprivation and expropriation in section 25 of the South African Constitution and the explicit compensation requirement in section 25(2), it seems unlikely that the Irish courts' approach to compensation can provide an example for South African courts to develop an appropriate remedy to save excessive regulatory measures from being declared invalid.<sup>163</sup>

## 2 1 4 Swiss law

Property is entrenched in article 26 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (Swiss Constitution).<sup>164</sup> Article 26(2) of the Swiss Constitution requires the state to compensate property owners for regulatory limitations that fall within the category of "material expropriation".<sup>165</sup> Material expropriation can be distinguished from formal expropriation in that there is no transfer of the property to the state, but the effects caused by the regulation are materially the same as in a case of formal expropriation.<sup>166</sup> In addition to article 26 of

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regulation constitute a taking of property at common law?" (2007) 24 *Environmental and Planning Law Journal* 161-181 at 167-168.

<sup>163</sup> See the discussion on constructive expropriation in South African law below.

<sup>164</sup> *Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18 April 1999*, available at <http://www.admin.ch/opc/de/classified-compilation/19995395/index.html#> (accessed on 28.08.2013). Article 26(1) of the Swiss Constitution provides that "[t]he right to own property is guaranteed". See <http://www.admin.ch/ch/e/rs/1/101.en.pdf> (accessed on 02.09.2013) for an official English translation of the Swiss Constitution.

<sup>165</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 350, 359. See also KA Vallender "Art. 26 Eigentums-garantie" in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 331. Article 26(2) of the Swiss Constitution states that "[t]he compulsory purchase of property and any restriction on ownership that is equivalent to compulsory purchase shall be compensated in full". See <http://www.admin.ch/ch/e/rs/1/101.en.pdf> (accessed on 06.08.2014) for an official English translation of the Swiss Constitution. The restriction on ownership that is equivalent to compulsory purchase is also referred to as "material expropriation" in Swiss law. See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 420; E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458.

<sup>166</sup> AJ van der Walt "The property clause in the new Federal Constitution of the Swiss Confederation 1999" (2004) 15 *Stellenbosch Law Review* 326-332 at 328. See also E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 429.

the Swiss Constitution, various federal statutes also provide a basis upon which a claim for compensation for material expropriation can be founded.<sup>167</sup>

The scope and content of the entrenched property guarantee are largely determined by the legislature.<sup>168</sup> However, the legislature's power in this regard is not unrestrained. Article 36 is applicable to restrictions on fundamental rights.<sup>169</sup> Article 36(1) and (2) contains the formal requirements for a valid interference with property rights. Any state interference with property rights must be for a public purpose and must be authorised by law.<sup>170</sup> Any limitation of a fundamental right that does not serve a public purpose or is not authorised by law is in conflict with section 36 of the

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<sup>167</sup> See for example Article 5.2 of the *Raumplanungsgesetz (RPG)* vom 22 Juni 1979 available at <http://www.admin.ch/opc/de/classified-compilation/19790171/index.html> (accessed on 28.08.2013); Article 18.1 of the *Bundesgesetz über die Nationalstrassen (NSG)* vom 8 März 1960, available at <http://www.admin.ch/opc/de/classified-compilation/19600028/index.html> (accessed on 2.09.2013); Article 18u of the *Eisenbahngesetz (EBG)* vom 20 Dezember 1957, available at <http://www.admin.ch/opc/de/classified-compilation/19570252/index.html> (accessed on 2.09.2013); Article 44 of the *Luftfahrtgesetz (LFG)* vom 21 Dezember 1948, available at <http://www.admin.ch/opc/de/classified-compilation/19480335/index.html> (accessed on 2.09.2013).

<sup>168</sup> KA Vallender "Art. 26 Eigentumsgarantie" in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 332 states that the Swiss property guarantee contains a similar institutional (*Institutsgarantie*) and individual (*Bestandesgarantie*) guarantee than that in German law. See E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 428-429 for a discussion on the two basic concepts underlying the property guarantee in Swiss law.

<sup>169</sup> AJ van der Walt "The property clause in the new Federal Constitution of the Swiss Confederation 1999" (2004) 15 *Stellenbosch Law Review* 326-332 at 332 fn 30 states that there is a resemblance between article 36 of the Swiss Constitution and section 36 of the South African Constitution. Article 36 provides that

- "1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.
- 2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.
- 3 Any restrictions on fundamental rights must be proportionate.
- 4 The essence of fundamental rights is sacrosanct".

See <http://www.admin.ch/ch/e/rs/1/101.en.pdf> (accessed on 06.08.2014) for an official English translation of the Swiss Constitution. See KA Vallender "Art. 26 Eigentumsgarantie" in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 339-434 for a discussion of the respective requirements in article 36.

<sup>170</sup> KA Vallender "Art. 26 Eigentumsgarantie" in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 341.



Swiss Constitution and invalid.<sup>171</sup> It is not possible to salvage the invalidity with the payment of compensation.

In addition to the formal requirements in article 36(1) and (2), article 36(3) requires that the state interference with property rights must be proportionate. Furthermore, article 36(4) guarantees protection of the core content of property rights. Van der Walt states that although the explicit proportionality guarantee and the formal guarantee of the core content of each fundamental right in article 36 of the Swiss Constitution are German in origin, the application of the proportionality principles results in different outcomes.<sup>172</sup> The proportionality principle in both German and Swiss law ensures that the legislature, in the determination of the content and limits of individual property rights, establishes an equitable balance between the interests of the individual and the social interest.<sup>173</sup> However, an infringement of the proportionality principle in German law may result in the regulation being invalid, whereas in Swiss law it can found a claim for compensation on the basis of material expropriation.<sup>174</sup>

In contrast to US and Irish law,<sup>175</sup> Swiss law is unique in the sense that the Swiss Constitution explicitly provides for compensation in instances where there was no formal expropriation of property, but the impact that results from a particular regulatory limitation on property rights is tantamount to that of expropriation (referred to as material expropriation). Swiss law draws a distinction between formal

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<sup>171</sup> E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 433.

<sup>172</sup> AJ van der Walt "The property clause in the new Federal Constitution of the Swiss Confederation 1999" (2004) 15 *Stellenbosch Law Review* 326-332 at 332 fn 30.

<sup>173</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 365.

<sup>174</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 366 fn 111.

<sup>175</sup> In US and Irish law courts award compensation for excessive regulatory limitations on property rights without statutory authority to do so. See the discussion on US and Irish law above.



expropriation; “normal” uncompensated police power regulation of the use of private property; and regulatory restrictions on the use of property, described as material expropriations, that are only valid when accompanied by compensation.<sup>176</sup> The criteria for distinguishing between material expropriation and less significant regulatory infringements of property are determined by the courts.<sup>177</sup>

Vallender<sup>178</sup> states that the Federal Supreme Court has been consistent in its jurisprudence that a material expropriation can present itself in two forms, namely by imposing a burden similar to that of formal expropriation in the sense of prohibiting or severely restricting the affected property owner’s existing or foreseeable future use of property in such a way that an essential entitlement deriving from that property right is taken away or, in cases where the burden is less severe, the infringement results in a *Sonderopfer* (individual sacrifice) in a way that violates the principle of equality because it singles out an individual owner or a select group of property owners to sacrifice the use and enjoyment of their property for the benefit of the public in general.<sup>179</sup> In both instances the limitation would be unreasonable in the absence of

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<sup>176</sup> AJ van der Walt “The property clause in the new Federal Constitution of the Swiss Confederation 1999” (2004) 15 *Stellenbosch Law Review* 326-332 at 327-328. See also KA Vallender “Art. 26 Eigentums-garantie” in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 345. According to E Riva “Regulatory takings in American law and ‘material expropriation’ in Swiss law – A comparison of the applicable standards” (1984) 16 *The Urban Lawyer* 425-458 at 442 fn 78, the term police power is narrower than its US law counterpart. It only embraces measures that are directly aimed at protecting public health, safety, morals and order, and does not serve the purpose of enhancing the general welfare.

<sup>177</sup> KA Vallender “Art. 26 Eigentums-garantie” in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 347. See also E Riva “Regulatory takings in American law and ‘material expropriation’ in Swiss law – A comparison of the applicable standards” (1984) 16 *The Urban Lawyer* 425-458 at 425.

<sup>178</sup> The standard formulation of material expropriation is set out by the Federal Supreme Court in *BGE* 91 I 329 (1965). See KA Vallender “Art. 26 Eigentums-garantie” in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 346-347. See also E Riva “Regulatory takings in American law and ‘material expropriation’ in Swiss law – A comparison of the applicable standards” (1984) 16 *The Urban Lawyer* 425-458 at 431-432.

<sup>179</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 360-361, 420; AJ van der Walt “The property clause in the new Federal Constitution of the Swiss Confederation 1999” (2004) 15 *Stellenbosch Law Review* 326-332 at 328. See also W Schaumann “Enteignung und Enteignungsentschädigung unter besonderer Berücksichtigung der Rechtsprechung des

compensation. Riva points out that the protection against the severe infringement of an essential entitlement deriving from property emanates from the property guarantee, whilst the protection against special sacrifice is a feature of the equality principle.<sup>180</sup>

The severity of the impact of a regulatory measure is determined with reference to a value-oriented test.<sup>181</sup> Generally, compensation is not required for regulatory restrictions of property that are objectively considered to be slight or insignificant or of temporary duration.<sup>182</sup> Vallender argues that an infringement is insignificant if the property owner can still put the property to good and economic use.<sup>183</sup> With regard to the protection of future uses, the Swiss Federal Supreme Court restricts the protection to only those uses that are reasonably foreseeable and are likely to realise in the near future.<sup>184</sup>

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Schweizerischen Bundesgerichts" (1960) 5/6 *Juristenzeitung* 142-150 at 146. E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 429-432 sets out the development of material expropriation in the Federal Supreme Court's jurisprudence.

<sup>180</sup> E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 453.

<sup>181</sup> E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 446-447.

<sup>182</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 360; KA Vallender "Art. 26 Eigentums garantie" in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 346. An example of a temporary restriction of property is found in *BGE 120 Ia 209* (1994) where the Federal Supreme Court held that a three to four year building moratorium does not establish a claim for compensation.

<sup>183</sup> KA Vallender "Art. 26 Eigentums garantie" in B Ehrenzeller; P Mastronardi; RJ Schweizer & KA Vallender (eds) *Die schweizerische Bundesverfassung: Kommentar* (2002) 328-352 at 345.

<sup>184</sup> *BGE 91 I 329* (1965). AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 360 fn 88 states that vague hopes or possibilities are not sufficient to merit protection. Courts take the legal and economic situation of the property holder into account when determining the probability that a future use could reasonably have been realised in the near future. The crucial moment for testing the foreseeability and probability of a future use is the moment when the regulation becomes effective. See also discussion in E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 432, 449-453.

The second ground upon which a claim for material expropriation can be based, namely special sacrifice, is a fairness test that bears no relation to value.<sup>185</sup> The payment of compensation in these instances is aimed at re-establishing the equilibrium destroyed by the applicable regulatory measure.<sup>186</sup> Although the regulatory interference in the second instance need not be as significant as in the first mentioned instance, the interference must still be intense to the extent that it justifies compensation.<sup>187</sup> Awards in terms of this principle occur very seldom. Riva argues that the Swiss test for material expropriation is really a combination of an express value diminution inquiry with an implied singling-out standard.<sup>188</sup>

The Swiss Constitution expressly recognises a second category of expropriation, namely regulatory interferences with property that has the same effects as expropriation. This type of excessive regulatory interferences is referred to as material expropriations. Swiss case law is clear on the matter that a regulatory interference that effects a harsh and excessive burden on a property holder or a regulatory interference that results in a limitation of one owner's property rights for the benefit of the public as a whole, although the burden may be less severe, constitutes material expropriation. The payment of compensation is a validity requirement for material expropriation. Therefore, the Swiss example of material expropriation is one possible solution to save excessive regulatory measures from being declared invalid. However, the explicit provision for compensation for material expropriation in the Swiss property clause makes the solution in that context unique and difficult to transfer to other jurisdictions. The South African Constitution does not

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<sup>185</sup> E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 446-447.

<sup>186</sup> E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 453.

<sup>187</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 361.

<sup>188</sup> E Riva "Regulatory takings in American law and 'material expropriation' in Swiss law – A comparison of the applicable standards" (1984) 16 *The Urban Lawyer* 425-458 at 454.

have a similar provision in section 25. The Swiss example is therefore of limited value to jurisdictions that do not have an explicit provision for something like constructive expropriation in their Constitutions. Therefore, unless section 25 of the South African Constitution is amended to expressly provide compensation for constructive expropriation, Swiss law does not serve as a good comparative source for the development of an alternative remedy to address the problem discussed in chapter 1.

## *2.2 Conclusion*

The notion of constructive expropriation is one example of an alternative remedy to the invalidation of excessive regulatory measures that are otherwise lawful and legitimate and serve a necessary and important public purpose but effects a burden that is excessive and disproportionate and renders the regulatory interference arbitrary in terms of section 25(1) of the South African Constitution. In terms of the doctrine of constructive expropriation, this type of excessive regulatory measure is judicially transformed into expropriation because it cannot be upheld without the payment of compensation. The compensation is therefore aimed at softening the harsh and excessiveness of the regulatory burden on the property owner; transforming the regulatory measure into or treating it as expropriation is the chosen method to root the compensation requirement in the constitution.

The notion of regulatory taking was developed in US law. Irish and Swiss law also recognise something similar to regulatory takings, in each case suited to the formulation of the relevant constitutional text. It is evident in the discussion of the three jurisdictions above that it is universally difficult for courts to precisely define

when a regulatory interference with property rights shades into expropriation and requires compensation to be valid. The factors considered by the courts in these jurisdictions overlap to some degree but do not necessarily carry the same weight in the respective jurisdictions.

The terminology used by the US and Irish property clauses and the explicit recognitions of material expropriation in the Swiss property clause assist the recognition and application of the doctrine of constructive expropriation or regulatory takings. The term “takings” in the Fifth Amendment of the US Constitution is not limited to formal expropriation of property but also includes regulatory interferences that have the same effect as expropriation. The US courts are therefore capable to uphold regulatory interferences of property rights that they deem excessive and disproportionate by requiring the state to pay compensation, even though the state did not formally expropriate the affected property holder. Similarly, the Irish Constitution does not distinguish between deprivation and expropriation of property. The requirement to pay compensation is not limited to formal expropriation of property. However, in the absence of a state acquisition of the affected property, it is a matter of degree whether compensation is a validity requirement. The absence of compensation constitutes an unjust attack on property if a regulatory interference effects a severe limitation of the owner’s property rights. Therefore, the Irish courts can sometimes uphold regulatory interferences with property that do not amount to formal expropriation of property but that have the same effects as expropriation by requiring the state to pay compensation. However, this possibility does not exist when regulatory measures are simply excessive; in those cases the Irish courts will usually invalidate the regulatory measure. Furthermore, the Swiss Constitution is unique in the sense that the constitutional text explicitly expressly recognises a second category of expropriation, namely material expropriation. Courts treat

regulatory interferences that cause a severe limitation of property rights or that affect one or a small group of property owners as material expropriation of property. Compensation is a validity requirement for a material expropriation. In this sense, excessive regulatory measures are constitutionally valid provided that they are accompanied by compensation.

The legal uncertainty and conflicting theories in the US and Irish law regarding the judicial determination when an excessive regulatory interference with property rights shades into expropriation and requires compensation raises doubt whether constructive expropriation is generally an appropriate alternative remedy to excessive regulatory measures discussed in chapter 1. Furthermore, the terminology in the US and Irish Constitution and the explicit provision of material expropriation in the Swiss Constitution renders the notion of something like constructive expropriation unique to these foreign law contexts. It is unlikely and arguably impossible to recognise and develop something like constructive expropriation in South African law, especially with regard to the *FNB* logic and methodology regarding the application of section 25 of the South African Constitution, state acquisition of property as a fixed requirement for expropriation, and the South African courts' general reluctance to recognise the doctrine of constructive expropriation.<sup>189</sup>

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<sup>189</sup> See the discussion of South African law below.

### 3 South African law on constructive expropriation

#### 3.1 Introduction

The question whether constructive expropriation is at all possible or should be developed in South African law remains a controversial issue. South African courts seem reluctant to recognise such a doctrine. In light of the recent Constitutional Court decision in *Agri SA v Minister for Minerals and Energy*<sup>190</sup> (*Agri SA*) it seems doubtful whether a doctrine of constructive expropriation can be developed in South African law, but the Court failed to reject it explicitly. South African legal scholars also seem to have divergent opinions on whether constructive expropriation could serve a useful purpose in South African law and, if it could, whether it would be possible to employ it.

Section 25 of the 1996 Constitution explicitly differentiates between two forms of state interference with property, namely deprivation and expropriation. No clear-cut formula exists to distinguish these two categories from each other. The textual distinction in the property clause requires substantive content to be ascribed to these two forms of state interferences which would facilitate distinguishing them from each other.<sup>191</sup> The need for such distinction arises from the fact that deprivation and expropriation are generally defined with reference to, or in contrast with each other.<sup>192</sup> Furthermore, the distinction is necessary to analyse whether there is room for the recognition of the constructive expropriation as a possible solution to the problem. Constructive expropriation occupies a grey area between deprivation and

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<sup>190</sup> 2013 (4) SA 1 (CC).

<sup>191</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 191; T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 267.

<sup>192</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 192; J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 213; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 541; I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 551.



expropriation. Constructive expropriation would mean that courts, instead of invalidating a necessary and important regulatory deprivation that effects arbitrary deprivation of property, may treat it as expropriation and require the payment of compensation.

In *Agri SA* the Constitutional Court held that “there is an overlap and no bold line of demarcation between sections 25(1) and 25(2)”.<sup>193</sup> Therefore, deprivation and expropriation are generally defined with reference to one another. General identifying characteristics of expropriation include the acquisition of title over an object by the state<sup>194</sup> or by another private person.<sup>195</sup> Expropriation may also entail the destruction of property.<sup>196</sup> Southwood,<sup>197</sup> Gildenhuys<sup>198</sup> and Currie and De Waal<sup>199</sup> argue that no expropriation exists without some transfer or acquisition of rights.<sup>200</sup> However, Van der Walt argues that state acquisition cannot be regarded as the single defining characteristic of expropriation.<sup>201</sup> In some instances the functional element of

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<sup>193</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48.

<sup>194</sup> In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paras 31, 32 citing *Minister of Defence v Commercial Properties Ltd and Others* 1955 (3) SA 324 (N) at 327 G in which the court held that expropriation means to “dispossess of ownership, to deprive of property”, the Constitutional Court in *Harksen* held the term “expropriation” involves acquisition of rights in property by a public authority for a public purpose and against the payment of compensation, while deprivation falls short of such acquisition. The Court also referred to *Beckenstrater v Sand Rivier Irrigation Board* 1964 (4) SA 510 (T) at 515 A. In *Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337 at 341 the Court stated that “[t]o acquire a thing is to become the owner of it.” See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 337, 344; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 541; I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 552; MD Southwood *The compulsory acquisition of rights by expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 14.

<sup>195</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 345.

<sup>196</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 345; AJ van der Walt & H Botha “Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*” (1998) 13 *South African Public Law* 17-41 at 21; A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 9.

<sup>197</sup> MD Southwood *The compulsory acquisition of rights by expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 15.

<sup>198</sup> A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 8.

<sup>199</sup> I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 553.

<sup>200</sup> See also J Murphy “Interpreting the property clause in the Constitution Act of 1993” (1995) 10 *South African Public Law* 107-130 at 115-116.

<sup>201</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 337-338, 345. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 338 argues that it is incorrect to require

expropriation might be the loss of the affected property by its former holder rather than acquisition by the state. It is not always possible to tell whether the state acquired the affected property or any property at all.<sup>202</sup> However, if a court has to distinguish between expropriation and deprivation by regulatory measures, it should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of property being acquired by the state.<sup>203</sup> This issue seems to have been settled in *Agri SA* where the Constitutional Court held that “[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state”.<sup>204</sup> Therefore, state acquisition of the affected property seems to be a necessary requirement for the establishment of expropriation.

Deprivation, on the other hand, can be characterised as a generally uncompensated, regulatory restriction or limitation on the use, enjoyment and exploitation of property by the state in terms of its police power.<sup>205</sup> Deprivation is usually effected through legislation or other law and is aimed at promoting or securing public health, public security and public safety.<sup>206</sup> A physical taking of

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actual dispossession or acquisition since it may seem to restrict expropriations to tangible property. See also AJ van der Walt & H Botha “Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*” (1998) 13 *South African Public Law* 17-41 at 21. H Mostert “The distinction between deprivations and expropriations and the future of the ‘doctrine’ of constructive expropriation in South Africa” (2003) 19 *South African Journal on Human Rights* 567-592 at 573, 577 argues that the element of appropriation cannot be a prerequisite for expropriation since no explicit mention of such requirement is made in section 25.

<sup>202</sup> PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 541. H Mostert “The distinction between deprivations and expropriations and the future of the ‘doctrine’ of constructive expropriation in South Africa” (2003) 19 *South African Journal on Human Rights* 567-592 at 572 states that the entitlements lost by the affected property owner may be different from those entitlements acquired by the state.

<sup>203</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) paras 63-64.

<sup>204</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

<sup>205</sup> H Mostert “The distinction between deprivations and expropriations and the future of the ‘doctrine’ of constructive expropriation in South Africa” (2003) 19 *South African Journal on Human Rights* 567-592 at 572.

<sup>206</sup> J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 213.

property is not necessary to constitute deprivation.<sup>207</sup> In chapter 1 it is pointed out that the Constitutional Court's definition of deprivation was not always consistent but the chapter concludes that the matter seems settled that any interference with the use, enjoyment or exploitation of private property, subject to the *de minimis* principle, constitutes deprivation of property for purposes of section 25(1).<sup>208</sup>

Narrowing the focus on the extent of a state infringement as a means to distinguish between deprivation and expropriation could be too abstract to sufficiently justify the context-sensitive interpretation that is required in the constitutional property enquiry.<sup>209</sup> A more effective method to distinguish between the two categories may be, in addition to any indication that the state or another person acquired the property, to view the effect of an infringement on the affected property owner as a useful indicator of the intention with which the infringement was made,<sup>210</sup> especially when viewed alongside the origin of the authorising power.<sup>211</sup> Expropriation is

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<sup>207</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others* 2005 (1) SA 530 (CC) para 32; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 41. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 190-191; J van Wyk *Planning law* (2<sup>nd</sup> ed 2012) 213.

<sup>208</sup> See the discussion on deprivation in chapter 1.

<sup>209</sup> PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 543. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49.

<sup>210</sup> In the *Harksen* decision, the infringement was not intended to be expropriation but the effect of section 21 of the Insolvency Act 24 of 1936 was to divest a specific property owner (the spouse of the insolvent debtor) of all entitlements pertaining to her property, albeit temporarily. AJ van der Walt "Striving for the better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878 at 868-869 argues that a different outcome could have resulted from the *Harksen* decision if the Court followed the *FNB* methodology and started by first analysing the deprivation issue. The effects of section 21 could have been regarded as unjustifiably harsh for the purpose it served and therefore arbitrary for purposes of section 25(1) of the Constitution.

<sup>211</sup> PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 544. I Currie & J de Waal *The bill of rights handbook* (5<sup>th</sup> ed 2005) 554 state that expropriation must be undertaken with an expropriatory purpose as opposed to a merely incidental expropriatory (appropriatory) effect. H Mostert "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on*

exercised in terms of the power of eminent domain.<sup>212</sup> Expropriation usually only affects a specific property or owner, whereas deprivation affects a certain category of property or class of persons generally.<sup>213</sup> Expropriation is brought about unilaterally by state action and since it is considered an original form of acquisition of ownership it does not need the cooperation of the affected property owner.<sup>214</sup> The acquisition or destruction is usually permanent and final in nature.<sup>215</sup> Van der Walt agrees that expropriation must be final,<sup>216</sup> but argues that the permanence on its own is not a reliable characteristic to distinguish between deprivation and expropriation since expropriation can also be temporary in exceptional instances.<sup>217</sup> Although the

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*Human Rights* 567-592 at 579 states that expropriations must be intended as such to be treated as such.

<sup>212</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 74; AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 192; PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 544; H Mostert "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567-592 at 572.

<sup>213</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 338; H Mostert "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567-592 at 573.

<sup>214</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 344; A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 11.

<sup>215</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 34; AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 345. AJ van der Walt & H Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *South African Public Law* 17-41 at 20 criticize the Court's reliance on the Indian case *HD Vora v State of Maharashtra* 1984 AIR 866 (SC) as authority for the view that the permanence of the state action is a distinguishing characteristic between deprivation and expropriation. The case focused on the distinction between expropriation and compulsory acquisition and requisition, the latter is a term specific to Indian constitutional property law and not identical or comparable to deprivation, and is therefore not reliable authority for distinguishing between deprivation and expropriation in South African law.

<sup>216</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 340. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 625 Rdn 151 for the position in German law regarding the permanence and finality of expropriation.

<sup>217</sup> PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 542 state that regulatory deprivations that limit the use of property to promote public health and safety often have a permanently limiting effect, whereas expropriations may sometimes be temporary. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 338; AJ van der Walt & H Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *South African Public Law* 17-41 at 22, 23; K Hopkins & K Hofmeyr "New perspectives on property" (2003) 120 *South African Law Journal* 48-62 at 51. See also *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

payment of compensation is a requirement for a valid expropriation,<sup>218</sup> it should not be seen as a point of departure in developing a definition of either deprivation or expropriation but should rather be seen as one of the results of the distinction between the two categories.<sup>219</sup>

It is difficult to delineate the precise boundaries of expropriation in an effort to create a clear and exhaustive distinction between deprivation and expropriation. The distinction may be clear on a basic level, but becomes complex if the focus falls exclusively on the acquisition or benefit acquired by the state, or the extent and permanence of the infringement.<sup>220</sup> If more focus is placed on the origin and nature of the authorising power, the chances that the two categories would be allowed to blend into each other become slimmer.<sup>221</sup> In addition to the difficulty of recognising constructive expropriation in light of state acquisition as a fixed requirement for expropriation, South African courts have been reluctant to recognise this solution. Moreover, it seems unlikely that constructive expropriation will fit in the courts' approach to applying section 25.

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<sup>218</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 343-344 points out that compensation is the only requirement that does not apply to deprivation and is therefore a distinguishing characteristic of expropriation. See also PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 542; H Mostert "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567-592 at 573.

<sup>219</sup> PJ Badenhorst; JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 543. In *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) para 18 the Supreme Court of Appeal held that in terms of the structure of section 25(2)

"it is more appropriate to view compensation as a pre-requisite for a lawful expropriation and a necessary consequence of an expropriation, rather than as a defining characteristic serving to distinguish expropriations from other forms of deprivation. The absence of an obligation to pay compensation is necessarily neutral, whilst its presence can never be more than a factor that may point to an expropriation".

<sup>220</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 200.

<sup>221</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 200.



In *Harksen v Lane NO and Others*<sup>222</sup> (*Harksen*) the Constitutional Court, dealing with the section 28 of the Interim Constitution,<sup>223</sup> adopted a categorical distinction between deprivation and expropriation in the sense that they are clearly and exhaustively distinguishable from each other, without any room for identifying a third, grey area in between them.<sup>224</sup> In terms of this categorical distinction recognising anything like a doctrine of constructive expropriation seemed unlikely. Subsequently, in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>225</sup> (*FNB*), the Court, this time confronted with section 25 of the 1996 Constitution, abandoned the categorical conceptual distinction and viewed expropriation as a subset of deprivation.<sup>226</sup> Both the categorical and the subset approach seem to

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<sup>222</sup> 1998 (1) SA 300 (CC).

<sup>223</sup> Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).

<sup>224</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 340. See also AJ van der Walt & H Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *South African Public Law* 17-41 at 35; AJ van der Walt "Striving for the better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878 at 862; K Hopkins & K Hofmeyr "New perspectives on property" (2003) 120 *South African Law Journal* 48-62 at 50; H Mostert "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567-592 at 575-576; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 378; A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 146; MD Southwood *The compulsory acquisition of rights by expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 14-15.

<sup>225</sup> 2002 (4) SA 768 (CC).

<sup>226</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-58. AJ van der Walt "Striving for the better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878 at 867 states that in *FNB* the Constitutional Court did not reject the distinction between deprivation and expropriation the Constitutional Court set out in *Harksen*, the Court merely introduced a new methodology whereby the distinction between deprivation and expropriation receives less attention at the beginning stages of the constitutional property inquiry. The subset approach means that, at least in principle, expropriation like any other deprivation must be authorised in terms of law of general application and should not be arbitrary. In addition it must be for a public purpose or in the public interest and is subject to the payment of compensation. See also *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) para 14 in which the Supreme Court of Appeal held that the Court in *FNB* did not expressly state that it departed from *Harksen*. According to the Supreme Court of Appeal, the differences in the approach between the respective decisions were readily ascribed to the fact that they were concerned with different questions – *Harksen* dealt with the question of expropriation in terms of section 25(2) and *FNB* with the question of arbitrary deprivation in terms of section 25(1). Moreover, the Supreme Court of Appeal held that both *Harksen* and *FNB* accepted that expropriation is a form or subset of deprivation.

exclude the possibility of recognising constructive expropriation, since neither of these approaches leaves room for a grey area between deprivation and expropriation.<sup>227</sup> Moreover, the requirement of state acquisition as a pre-requisite for expropriation set in *Agri SA* by the Constitutional Court logically precludes the recognition of constructive expropriation.<sup>228</sup> It is necessary to trace judicial pronouncements on the issue before asking the question whether this construction is possible in South African law.

### 3.2 *Judicial views on constructive expropriation*

The Supreme Court of Appeal considered the question whether constructive expropriation should be recognised in South African law for the first time in *Steinberg v South Peninsula Municipality*<sup>229</sup> (*Steinberg*). Although the Court did not deem it necessary on the facts of the case to decide the issue of constructive expropriation, it nevertheless held *obiter* that

“there may be room for the development of a doctrine akin to constructive expropriation in South Africa ... [but it] may be undesirable both for the pragmatic reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right which is limited by

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<sup>227</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 347. See also T Roux “Property” in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 33.

<sup>228</sup> See the discussion of the *Agri SA* decision below.

<sup>229</sup> 2001 (4) SA 1243 (SCA). The appellant approached the High Court for an order forcing the respondent to take all steps necessary to complete the expropriation process initiated by the applicable road scheme. The affected property in this case was situated within the area affected by a road scheme, which if implemented as proclaimed would cut across her property. The appellant argued that the road planning scheme prevented her from selling her property and also precluded certain uses of the property. She relied on the notion of constructive expropriation to force the local authority to complete a threatened but incomplete expropriation process, which would entitle her to compensation. See AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 377-382 for a discussion of the decision.



executive action could for instance adversely affect the constitutional imperative of land reform".<sup>230</sup>

Van der Walt criticises the Court's statement on the grounds that constitutional principles cannot be sacrificed for the sake of clarity and certainty in private law and that the Court's concern regarding the impediment on land reform may be ill conceived since foreign law jurisprudence indicates that constructive expropriation usually applies with regard to commercial property and not land reform disputes.<sup>231</sup> Furthermore, even if constructive expropriation were to be recognised, the amount of compensation would have to be calculated in terms of section 25(3), which leaves the court enough room to ensure that the importance of land reform is taken into account.<sup>232</sup> The Court's remarks on constructive expropriation were *obiter* and therefore it had no binding effect.

Subsequent to *Steinberg*, the issue of constructive expropriation was raised in only a few other cases. In *Oudekraal Estates (Pty) Ltd v City of Cape Town*<sup>233</sup> the appellant argued that the respondents' application to set aside the 1957 township approval granted by the Administrator of the Western Cape Province was no more than a thinly disguised effort to expropriate the appellant's property without having to pay compensation. The Court refused to speculate whether this was the case because the case was not about expropriation.<sup>234</sup>

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<sup>230</sup> *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8. According to the Supreme Court of Appeal, situations where development of a narrow doctrine of constructive expropriation may prove useful are cases where a public body utilises its power to regulate private property so excessively that it may be characterised as expropriation. See also reference in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 65.

<sup>231</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 379-381.

<sup>232</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 381.

<sup>233</sup> 2010 (1) SA 333 (SCA).

<sup>234</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) paras 68, 78. This decision was an appeal against the Supreme Court of Appeal's finding in *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2004 (6) SA 222 (SCA) on the validity of the Administrator's township

In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another*<sup>235</sup> (*Reflect-All*) the Constitutional Court considered whether certain provisions of the Gauteng Transport Infrastructure Act 8 of 2001, which according to the Court effected a “serious” deprivation, amount to expropriation without compensation. The Court found the *Steinberg* decision instructive with regard to the suitability of developing a notion of constructive expropriation in South African law. However, the Constitutional Court did not express a clear or authoritative view on this issue and merely stated that it was not convinced that the adoption of this doctrine would be appropriate in the South African constitutional order. The Court held that the case before it, in any event, did not suit a development of such a doctrine because “[i]f regulation in cases such as the present were to be characterised as amounting to expropriation, government would be crippled in discharging its obligations in regulating the use of private property for public good”.<sup>236</sup>

In *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC*<sup>237</sup> the Supreme Court of Appeal again mentioned the uncertainty surrounding the doctrine of constructive expropriation. It held that property may only be expropriated subject to the payment of compensation and pointed out that no such requirement exists in the

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approval of the appellant’s land, 31 years prior to the appellant’s efforts to develop the property. The case concerned the application of the principles of administrative law, especially the Court’s discretion in terms of the “delay rule” in relation to administrative review. In terms of the “delay rule”, courts have the discretion when reviewing and considering whether to set aside an administrative decision, to uphold that decision despite the presence of substantive grounds for setting such decision aside where an undue and unreasonable delay in the commencement of review proceedings would result in prejudice to other parties.

<sup>235</sup> 2009 (6) SA 391 (CC).

<sup>236</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Province Government and Another* 2009 (6) SA 391 (CC) para 65. This is similar to what the US Supreme Court stated in the *Mahon* decision.

<sup>237</sup> 2012 (6) SA 638 (SCA). In this decision, the Court considered whether section 22 of the Electronic Communications Act 36 of 2005 (ECA), as interpreted by the appellant, infringes section 25 of the Constitution.

case of deprivation.<sup>238</sup> However, the Court stated that compensation or the offer of compensation may well take the regulatory interference out of the realm of arbitrariness.<sup>239</sup>

In *City of Cape Town v Helderberg Park Development (Pty) Ltd*<sup>240</sup> (*Helderberg*) the Supreme Court of Appeal considered whether the appellant exceeded its authority in terms of section 28 of the Land Use Planning Ordinance 15 of 1985 (LUPO) and thereby effected an expropriation without compensation.<sup>241</sup> The local authority attached a condition to its approval of the respondent's subdivision plan that required street reserves that were 32 metres wide, instead of the usual 16 metres. The developer claimed compensation for the additional area of land. The majority judgment by Farlam JA rejected the developer's claim and held that the respondent's remedy was limited to the internal appeal procedure provided for by LUPO and that it was therefore not entitled to claim compensation.<sup>242</sup> However, Heher JA in his minority judgment agreed with the developer's claim. Without resorting to the Constitution, Heher JA applied the rule of interpretation set out in *Belinco (Pty) Ltd v Bellville Municipality*<sup>243</sup> that "a legislative intention to authorise expropriation without compensation will not be imputed in the absence of the express words or plain implication" and concluded that "section 28 is capable of meaning that the vesting of

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<sup>238</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 16.

<sup>239</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 16.

<sup>240</sup> 2008 (6) SA 12 (SCA). See discussion of this decision in AJ van der Walt "Constitutional property law" 2008 (2) *Juta's Quarterly Review* at 2.1.1; AJ van der Walt "Constitutional property law" 2008 *Annual Survey of South African Law* 231-264 at 243-247.

<sup>241</sup> Section 28 of LUPO provides that

"[t]he ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need".

<sup>242</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 11.

<sup>243</sup> 1970 (4) SA 589 (A) at 597C.

public places and streets beyond the normal need arising from a particular subdivision will give rise to a claim for compensation".<sup>244</sup> Farlam JA disagreed with Heher JA's interpretation of section 28, stating that this could not have been the intention of the legislature.<sup>245</sup> Furthermore, Farlam JA also disagreed with Heher JA's finding that the relevant condition upon approval of the subdivision that provided for 32 metres of street reserves constituted an expropriation. Farlam JA distinguished the vesting of land in terms of section 28 of LUPO from expropriation on the basis of the fact that vesting is voluntary in nature and the owner was not forced to submit to the vesting; he could have avoided the vesting of the portions of his land by not proceeding with the proposed subdivision.<sup>246</sup> Farlam JA concluded that the respondent's remedy was limited to the internal appeal procedure in section 44 of LUPO and judicial review. Furthermore, the respondent could not claim compensation if it failed to exercise those remedies.<sup>247</sup>

The Court's finding in *Helderberg* was confirmed in *City of Cape Town v Arun Property Developments (Pty) Ltd*<sup>248</sup> (*Arun*). In *Arun* the Supreme Court of Appeal held that the facts of the case were not distinguishable from *Helderberg* and reprimanded the court a quo for deviating from the precedent set by the Court in *Helderberg*.<sup>249</sup> In *Arun* the Court emphasised that the purpose of section 28 of LUPO was to vest the property specified in the section in a local authority to enable it to fulfil

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<sup>244</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) paras 40-41.

<sup>245</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 3.

<sup>246</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 4. AJ van der Walt "Constitutional property law" 2008 *Annual Survey of South African Law* 231-264 at 244 states that the vesting requirement in section 28 is referred to as "exactions" in US law. Furthermore, it is generally considered reasonable to expect the developer to donate land in so far as that land is required to accommodate the impact of the development. Difficulty arises when the developer is expected to donate land unrelated or disproportionate to the impact caused by the development. See the discussion on US law above.

<sup>247</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 11.

<sup>248</sup> [2014] ZASCA 56 (16 April 2014).

<sup>249</sup> *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 (16 April 2014) paras 25, 29-31.

its obligations as a local authority in relation thereto and not to enable expropriation of land not based on the normal need therefor.<sup>250</sup> The latter would have effected arbitrary deprivation of property in conflict with section 25(1) of the Constitution.<sup>251</sup> The Court concluded that the appropriate remedy was to take the condition attached to the township development approval on administrative review, using the internal remedies provided in LUPO.<sup>252</sup>

A similar situation as the developmental contributions in *Helderberg* and *Arun* arose in *Conforth Investments (Pty) Ltd v Ethekweni Municipality*<sup>253</sup> (*Conforth*).<sup>254</sup> The facts of the case were unclear and on one interpretation thereof the deprivation in

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<sup>250</sup> *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 (16 April 2014) para 23.

<sup>251</sup> *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 (16 April 2014) para 23.

<sup>252</sup> *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 (16 April 2014) para 28.

<sup>253</sup> [2013] ZAKZDHC 68 (28 November 2013).

<sup>254</sup> In this case, the plaintiff (*Conforth*) claimed compensation from the defendant (*Municipality*) for loss of its beneficial use, occupation and control of the property that formed the right of way registered over *Conforth's* property. *Conforth's* property bordered a highway, which was under the ownership and control of the Municipality. *Conforth* became the registered owner of the said property in 1986 and at the same time applied for town planning approval for the rezoning of the property. Such approval was granted but subject to the condition that the ownership of the portion of the site forming part of the existing road reservation to the highway or a right of way servitude shall be donated and transferred to the Municipality. *Conforth* completed the development but did not act on the said condition. However, in 2011 *Conforth's* property was consolidated with an adjoining property and upon registration *Conforth* also registered a servitude of right of way over the property in favour of the Municipality. In the proceedings before the court *Conforth* based its claim for compensation on the following grounds: That the registration of the servitude of right of way was not a gift or donation but was done pursuant to the condition imposed by the town planning decision; that the imposition of the condition was unlawful because it constituted arbitrary deprivation of property in terms of section 25(1) of the Constitution; if the imposition of the condition constituted expropriation it entitled *Conforth* to compensation; and lastly that the court should recognise the doctrine of constructive expropriation and this would have entitled *Conforth* to be compensated. The Municipality argued that there was no deprivation because section 208 of the Local Authorities Ordinance 25 of 1974, which provided that "[t]he ownership, management and control of all public streets ... and the land comprised in such streets and places shall vest in the council" vested ownership of the property in the Municipality long before *Conforth* acquired ownership of the land. Although the court did not draw a distinction between the street and the road reserve, it nevertheless held that section 208 did not deprive *Conforth* of its property since ownership of the property had already vested in the Municipality before *Conforth* acquired the land. Despite the court's conclusion that no deprivation occurred, the court proceeded to consider whether section 208 effected expropriation and whether compensation was payable. In light of *FNB*, which held that expropriation is a subset of deprivation, the court's consideration of expropriation after it already concluded that no deprivation occurred seems futile. See AJ van der Walt "Constitutional property law" 2013 (1) *Juta's Quarterly Review* at 2.1 for a critical discussion of the decision.

question assumed the form of a development contribution (referred to as an exaction in US law).<sup>255</sup> The plaintiff (Conforth) claimed compensation and based its claim on, *inter alia*, constructive expropriation. Although the High Court acknowledged that the question whether constructive expropriation is part of South African law has been raised but never authoritatively decided, it nevertheless defined what is meant by constructive expropriation and eventually found it unnecessary to decide the issue. In the case of developmental contributions, *Helderberg*, *Arun* and to a certain extent also *Conforth* indicate that the correct procedure is not to challenge the decision on the basis that it constitutes arbitrary deprivation in terms of section 25(1) of the Constitution, rather to use the administrative remedies provided in the relevant statute, which are often administrative and judicial review.

In *Grobler v Msimanga*<sup>256</sup> (*Grobler*) the South Gauteng High Court considered whether the court, in exercising the discretion granted in section 4(7) of the

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<sup>255</sup> On the facts of the case it is not clear whether the Ordinance simultaneously vested ownership of the street and the road reserve in the Municipality. AJ van der Walt "Constitutional property law" 2013 (1) *Juta's Quarterly Review* at 2.1 discusses two possible constructions and the implications of each. In terms of the first construction, the Municipality acquired ownership of the street including the road reserve, whereas, on the second construction, the Municipality acquired ownership of the street but not of the road reserve. In terms of the second construction the Municipality only acquired a right of way servitude registered in its favour by Conforth in terms of the condition included in the township development approval. On the first construction, Van der Walt agrees with the court's finding that no deprivation, and therefore also no expropriation could have taken place as Conforth's predecessors in title had already lost ownership of the particular property before Conforth acquired the land. On this construction the registration of the servitude was a nullity firstly because an owner may not register a servitude on his own land and secondly, Conforth did not have the right to grant a servitude over property it did not own. Furthermore, section 208 did not constitute expropriation because the purpose of section 208 was not to acquire new property but to enable the proper control, administration and management of public roads. Van der Walt states that the second construction is more problematic because the purpose of the condition added to the township development approval would have been to acquire additional land, which assumes the form of a developmental contribution (exaction). The condition would therefore have constituted deprivation of property, the non-arbitrariness of which would have to be determined. Van der Walt argues that the second construction of the facts is probably not the correct version because, if section 208 vested ownership of the road reserve in the Municipality, the arbitrariness test should probably not address section 208 but rather the legislation that regulates township development approvals and the conditions that may be attached to it. Moreover, Van der Walt argues that even if the second construction was the correct version, the *Helderberg* decision illustrates the unwillingness of the South African courts to treat developmental contributions as expropriation, despite the unreasonable and disproportionate effects it may have on a property owners. Van der Walt states that courts prefer that claimants should rely on administrative remedies. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 290-291.

<sup>256</sup> [2008] 3 All SA 549 (W).



Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) will effectively allow expropriation without compensation. Section 4(7) of PIE applies to unlawful occupiers who have occupied the land in question for more than six months at the time when the proceedings are initiated. The section provides that

“a court *may* grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women” (own emphasis).

It was argued that section 4(7) created the possibility for a court to exercise its discretion against the granting of an eviction order. Such an order was said to constitute expropriation without compensation or, alternatively to allow constructive expropriation of the landowner's property. The court stated that the purpose of the Act was to regulate eviction, to make it just and equitable, and to take into account all the relevant circumstances, including the rights and human dignity of unlawful occupiers who were landless and destitute.<sup>257</sup> Furthermore, the court held it could never have been the intention of the legislature to provide a court with a discretion to expropriate or constructively expropriate<sup>258</sup> a landowner through unlawful occupation without compensation.<sup>259</sup> The court applied a purposive interpretation to section 4(7) and concluded that the section, seen in the context of PIE as a whole, did not intend

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<sup>257</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 137.

<sup>258</sup> In *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 125 the court emphasised that expropriation must take place in accordance with legislative measures which provide therefor. Therefore, expropriating land for a purpose not intended should not be enforced. According to the court, this was a clear indication that the legislature did not intend to incorporate a procedure for indirect expropriation of property into legislation by way of the provisions of PIE.

<sup>259</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) paras 105-107, 215. See also *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 18 in which the Supreme Court of Appeal held that

“[t]he effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in s 4 envisage”.

This was confirmed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 31.



to permanently deprive a landowner of ownership of property or the enjoyment of property and it also did not intend to provide a court with a wide discretion to grant eviction or to refuse it.<sup>260</sup> Moreover, the requirement of “just and equitable” in section 4(7) applied to the kind of order that should be granted under the circumstances.<sup>261</sup>

In addition to taking account of the needs and circumstances of the unlawful occupiers to determine what a just and equitable order should be, the court emphasised that it should also take into the account what the effect of such order would be for the landowner.<sup>262</sup> The court considered firstly, whether a refusal to grant an eviction order would constitute an arbitrary deprivation of property in terms of section 25(1) of the Constitution; and secondly, whether such a deprivation could be regarded as expropriation in terms of section 25(2) of the Constitution. The court applied the arbitrariness test laid down by the Constitutional Court in *FNB* and concluded that the deprivation was temporary (in the sense of delaying the enforcement of the eviction order in accordance with the facts and circumstances of the case before it) and there was a sufficient relationship between the purpose for the deprivation and the property as well as the person whose property was affected.<sup>263</sup> Therefore, the deprivation that resulted from section 4(7) was not arbitrary. However, the court pointed out that a permanent deprivation of property was a different story.<sup>264</sup> On the other hand, the court questioned whether the refusal of an eviction order could constitute constructive expropriation which would require

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<sup>260</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 132.

<sup>261</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 102.

<sup>262</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) paras 142-143.

<sup>263</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 151.

<sup>264</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 151. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 100 the Constitutional Court held that a property owner has to endure the reasonable and temporary limitation of its property rights without compensation to give the state a reasonable time to comply with its obligation of providing alternative accommodation to the occupier who stands to be evicted. However, the Court emphasised that it cannot be expected that the landowner bear this burden indefinitely.

compensation.<sup>265</sup> According to the court, constructive expropriation was applicable where some state action result in loss to an affected property owner, which justifies the conclusion that compensation was required, even though the state did not intend to acquire the property for itself.<sup>266</sup> The court held that the refusal of an eviction order was such an instance where the state did not acquire the property but did acquire the advantage of not having the obligation to provide alternative land. According to the court, this together with the absence of a statutory duty to pay compensation constituted constructive expropriation.<sup>267</sup> However, the court held that it was never the intention of PIE that the legitimacy of the court's decision not to grant eviction may be challenged on a constitutional basis because it constituted constructive expropriation without compensation.<sup>268</sup> The consequences thereof would be the invalidation of the provisions of PIE that constructively expropriates landowners without compensation, which would inevitably frustrate land reform. According to the court, PIE was never intended to create such a situation.<sup>269</sup> Furthermore, the court held that PIE could not have intended that the owner may claim that it had a right to compensation because the court's decision constituted constructive expropriation.<sup>270</sup> The court held that such a conclusion would open the door for unlawful occupiers to unlawfully occupy land and argue that it will be just and equitable that the court exercise its discretion and refuse to grant eviction, which would lead to constructive expropriation and a concomitant obligation on the state to pay compensation. The effect thereof would be astronomical and could not have been intended by the

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<sup>265</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) paras 152, 161.

<sup>266</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 164.

<sup>267</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 166.

<sup>268</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 167.

<sup>269</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 169.

<sup>270</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 167.

legislature.<sup>271</sup> Despite the court's lengthy discussion of constructive expropriation, it nevertheless found it unnecessary to decide whether any refusal of an application for eviction of unlawful occupiers constituted arbitrary deprivation of property, or if it constituted expropriation, or if it warranted compensation for constructive expropriation.<sup>272</sup> The court concluded that the legislature simply intended to provide for principles and procedures according to which courts should grant eviction orders, and in particular, to emphasise the circumstances and facts that should be taken into account by the courts in formulating eviction orders.<sup>273</sup> The finding of this court that the temporary deprivation of a landowners property rights do not constitute arbitrary deprivation was subsequently confirmed by the Constitutional Court.<sup>274</sup> However, it is argued in chapter 4 that the burden on the landowner can be ameliorated by providing for compensation in PIE itself under certain circumstances.

*Agri SA v Minister for Minerals and Energy*<sup>275</sup> (*Agri SA*) is the most recent Constitutional Court decision on the distinction between deprivation and expropriation and may prove to answer the question whether the doctrine of constructive expropriation could be developed in South African law. The appellant argued that the commencement of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) effected expropriation of its existing coal rights without the payment of compensation.<sup>276</sup> In effect, the MPRDA froze the ability to sell, lease or cede

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<sup>271</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 178.

<sup>272</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 176.

<sup>273</sup> *Grobler v Msimanga* [2008] 3 All SA 549 (W) para 180.

<sup>274</sup> See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). See chapter 4 for a discussion of the *Blue Moonlight* decision.

<sup>275</sup> 2013 (4) SA 1 (CC).

<sup>276</sup> In *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 33, 42-45 the Constitutional Court upheld the Supreme Court of Appeal's decision in *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA). The court a quo in *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP) held that the enactment of the MPRDA expropriated the property of former mineral right's holders. See AJ van der Walt "Constitutional property law" 2013 (2) *Juta's Quarterly Review* at 2.1.1 for a discussion on the Constitutional Court's decision.

unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Mineral Resources (Minister). Furthermore, the MPRDA abolished the holder's entitlement to sterilise mineral rights by extinguishing the holder's entitlement not to sell or exploit minerals. In terms of the facts, Sebenza (Pty) Ltd (Sebenza) bought coal rights on land of which it was not the owner and registered them in its name in 2001. However, in 2004 the MPRDA came into effect and rendered Sebenza a holder of an "unused old order right", which afforded Sebenza an exclusive right for a period of one year to apply for a prospecting or mining right. However, Sebenza was subsequently liquidated and could neither comply with the requirements for the application of a prospecting or mining right in terms of the transitional provisions of the MPRDA nor could it sell its coal rights due to the provisions of the MPRDA. Therefore, Sebenza claimed compensation in terms of Schedule II to the MPRDA, on the grounds that the MPRDA had expropriated its mineral rights. Agri SA subsequently procured Sebenza's claim for compensation. Schedule II to the MPRDA contained the transitional measures for a holder of old order rights to comply with the requirements of the MPRDA. Furthermore, item 12 of the Schedule provided that any person who can prove that his property has been expropriated in terms of the MPRDA may be entitled to compensation from the state. However, Sebenza's claim was never based on this provision. Although the Constitutional Court upheld the Supreme Court of Appeal's judgment, it disagreed with the Supreme Court of Appeal's finding as to the nature of the property claimed to be expropriated by the MPRDA.<sup>277</sup> According to the Constitutional Court, the Supreme Court of Appeal did not acknowledge that the entitlement not to mine or the ability not to exploit minerals stemmed from mineral

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<sup>277</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 33. In *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) paras 99, 117 the Supreme Court of Appeal held that the right to mine was vested in the state and therefore concluded that Sebenza's mineral rights did not constitute property. Furthermore, it held that Sebenza might have had value but that value in itself was not property.

ownership and formed one of the essential components of mineral ownership.<sup>278</sup> Therefore, this right was undoubtedly property with economic value.<sup>279</sup> Furthermore, prior to the commencement of the MPRDA the state could only compel exploitation by expropriation against payment of compensation; however, under the MPRDA the right to compensation has been lost.<sup>280</sup> The Court considered section 25 of the Constitution to determine whether there was deprivation which rose to the level of expropriation. The Court held that deprivation within the context of section 25 included extinguishing of a right previously enjoyed. Furthermore, it agreed with the *FNB* decision that expropriation is a subset of deprivation.<sup>281</sup> According to the Court, there was an overlap and no bold line of demarcation between deprivation and expropriation.<sup>282</sup> Deprivation related to sacrifices that private property holders may have to make without compensation, whereas expropriation entailed *state acquisition* of that property in the public interest and must always be accompanied by compensation.<sup>283</sup> Therefore, more was required to establish expropriation. The Court held that the MPRDA did deprive Sebenza of property within the meaning of section 25(1) of the Constitution.<sup>284</sup> With regard to the extent of the deprivation the Court considered that after the commencement of the MPRDA holders of mineral rights had the exclusive entitlement to apply for the right to prospect or mine but only for one year. In addition, the free and unregulated right to sterilise mineral rights was terminated and prospect and mining rights only existed and could only be sold in

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<sup>278</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 43.

<sup>279</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 44, 50. The Court held that mineral rights could be a self-standing real right, which could be severed from landownership and had value which appreciated with time. It could be kept as a valuable investment or asset, be bequeathed or mortgaged and constituted property for purposes of section 25 of the Constitution.

<sup>280</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 46, 106.

<sup>281</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48.

<sup>282</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48.

<sup>283</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48 (own emphasis).

<sup>284</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 53.

terms of the MPRDA. However, such transfer was subject to conditions which not every landowner or mineral rights holder could meet (as Sebenza for example).<sup>285</sup> Moreover, holders of unused old order rights who could not apply for the right to prospect or mine within the time frame set out in the MPRDA's transitional provisions, or whose applications were unsuccessful, lost all their mineral rights permanently.<sup>286</sup> Despite the Court's finding that the MPRDA effected a deprivation of Sebenza's property and similarly-positioned holders of pre-existing mineral rights, both parties agreed that the deprivation was not arbitrary.<sup>287</sup>

This led the Court to consider whether this deprivation rose to the level of expropriation. The Court held that "to prove expropriation, a claimant must establish that the state has acquired the substance or core of what it was deprived of".<sup>288</sup> Therefore, although exact correlation was not required, there should be sufficient congruence or substantial similarity between the rights that were lost and the rights that were acquired.<sup>289</sup> The Court emphasised that there can be no expropriation where deprivation does not result in property being acquired by the state.<sup>290</sup> The Court recognised the dual purpose served by section 25, namely protecting existing private property but also promoting the equitable distribution of land and equitable access to our national resources. The MPRDA fell within the latter purpose in the sense that it is aimed at facilitating equitable access to opportunities to exploit minerals and petroleum resources. Although the Court held that section 25 imposed an obligation not to over-emphasise private property rights at the expense of the

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<sup>285</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 51, 55. Sebenza was not in a financial position to apply for a prospect or mining right. Sebenza was subsequently liquidated, which in terms of section 56(d) of the MPRDA precluded it from being granted the right to prospect or mine.

<sup>286</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 52.

<sup>287</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 53.

<sup>288</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 58.

<sup>289</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 58.

<sup>290</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

state's social responsibilities, it held that a too narrow meaning of acquisition, stemming from a deprivation, could militate against the constitutional protection sought to be given to property rights in terms of section 25(2) of the Constitution.<sup>291</sup> However, on the other hand, an overly liberal interpretation of acquisition could blur the line between deprivation and expropriation and undermine the constitutional imperative to transform our economy as envisioned by section 25(4) of the Constitution.<sup>292</sup> The Court stated that a one-size-fits-all determination of what acquisition entailed was not only elusive but also inappropriate. Instead the Court held that an *ad hoc* approach was more appropriate since acquisition was likely to manifest in various ways, especially if the right is incorporeal in nature.<sup>293</sup> The Court held that the MPRDA did deprive Sebenza of its coal rights and vested them and other mineral and petroleum resources in the state, which is the custodian of such rights on behalf of the people of South African. However, the state did not acquire any mineral rights, including those of Sebenza, at the commencement of the MPRDA.<sup>294</sup> According to the Court, the state, as the custodian of these resources, was merely a facilitator or conduit through which broader and equitable access to mineral and petroleum resources can be realised.<sup>295</sup> This did not take away the substance of unused old order rights from their holders. The Court held that “[b]ut for sterilisation, the core right was left intact and capable of full enjoyment by those who wished to and were able to exploit it”.<sup>296</sup> Furthermore, the MPRDA, subject to the transitional arrangements, put an end to the rights without necessarily transferring

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<sup>291</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 62-63.

<sup>292</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 63.

<sup>293</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 64.

<sup>294</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 68.

<sup>295</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 68.

<sup>296</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 71.



them to the state.<sup>297</sup> In the absence of a state acquisition in this case, the Court concluded that there was no expropriation of Sebenza's rights.

Furthermore, it held that the transitional arrangements were carefully designed to alleviate potential hardship and prevent expropriation.<sup>298</sup> With regard to item 12 of the Schedule, the Court held that it was more a cautious approach to provide for unforeseen eventualities rather than an acknowledgment or reinforcement of the idea that the MPRDA necessarily has signposts of expropriation.<sup>299</sup> Although the Court concluded that there was no expropriation in this case, it left the avenue of future expropriation claims open when it held that it was inappropriate to decide definitely that expropriation in terms of the MPRDA was incapable of ever being established.<sup>300</sup>

In addition to the main judgment, both Cameron J and Froneman J wrote separate judgments in which they agreed with the majority that the appeal should be dismissed, albeit on different grounds. Furthermore, both Cameron J and Froneman J cautioned against the majority's finding that state acquisition was a necessary feature of expropriation.<sup>301</sup> Moreover, Froneman J disagreed with the majority's finding that no state acquisition took place.<sup>302</sup> According to Froneman J,

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<sup>297</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 71.

<sup>298</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 74.

<sup>299</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 74. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 420 states that the explicit provision for compensation seems to negate the possibility of classifying the deprivation as constructive expropriation.

<sup>300</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 75.

<sup>301</sup> In *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 78 Cameron J stated that acquisition by the state was a general characteristic of expropriation but not a necessary and inevitable requirement. Furthermore, Cameron J argued that the determination of whether expropriation has occurred was a context-based *ad hoc* enquiry. This view was shared by Froneman J in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 102 who pointed out that *FNB* never laid down the requirement of state acquisition as an inflexible requirement for expropriation and argued that "[i]t would be inadvisable to extrapolate an inflexible general rule of state acquisition as a necessary requirement from these cases to the current one".

<sup>302</sup> Froneman J in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 80-81 found it unconvincing, "both in plain language and legal conceptualism, to say that the power of disposition that private mineral ownership entailed was not acquired or does not now vest in the state". Furthermore, Froneman J argued that although the state may not have acquired the right to exploit

compensation was not necessary because the unused old order rights conferred on Sebenza under the MPRDA constituted just and equitable compensation for what it previously had and has now lost.<sup>303</sup> Froneman J called it “compensation in kind” and viewed it as an alternative form of just and equitable compensation for expropriation as required by section 25(3) of the Constitution.<sup>304</sup> However, Froneman J warned that the mere inclusion of “compensation in kind” provisions does not immunise legislation from a finding that expropriation occurred and that compensation may be payable.<sup>305</sup>

Froneman J’s approach would dispense the need to formally analyse the question when a deprivation becomes expropriation.<sup>306</sup> However, Froneman J acknowledged that there was no precedent for this approach.<sup>307</sup> Moreover, both Cameron J and Froneman J’s judgments are minority judgments and are therefore not legally binding. Therefore, in light of the majority in *Agri SA* state acquisition is a necessary requirement for expropriation. Although some deprivations involve state acquisition of the affected property, for example tax and forfeiture, it seems that *all* expropriations will involve acquisition. The types of excessive regulatory measures that are generally classified as constructive expropriation generally do not involve

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minerals, it did acquire the power to allocate and dispose of exploitation rights; a power which owners of minerals previously had.

<sup>303</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 79, 88. Froneman J argued that the MPRDA established an equitable balance between the protection of pre-existing rights and the transformative purpose of the MPRDA. According to Froneman J, the transitional arrangements of the MPRDA ensured the continuation of a substituted form of pre-existing right for a limited period of time within which the pre-existing rights holder had the exclusive right to convert his into MPRDA rights.

<sup>304</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 88.

<sup>305</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 88.

<sup>306</sup> According to Froneman J in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 92, 94, the deprivation and expropriation distinction was merely a conceptualisation in legal terms, made in order to arrive at a conclusion of when compensation ought to be payable under section 25 of the Constitution.

<sup>307</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 91.

acquisition of the affected property by the state or anybody else.<sup>308</sup> Because the notion of constructive expropriation involves the judicial transformation of an excessive regulatory measure into expropriation, the South African Constitutional Court's recognition of state acquisition as a fixed requirement for expropriation seems to negate the possibility of adopting the doctrine of constructive expropriation.<sup>309</sup> Furthermore, although the possibility of recognising the doctrine of constructive expropriation in South African law has never expressly been rejected, the discussion of the case law above illustrates the courts' reluctance to recognise constructive expropriation. Moreover, Roux and Van der Walt argue that the *FNB* methodology applicable to the interpretation and application of section 25 of the Constitution does not leave room for the recognition of constructive expropriation since an excessive regulatory measure will almost always fail the non-arbitrariness requirement in section 25(1) and consequently never reach the expropriation analysis stage in section 25(2) of the Constitution.<sup>310</sup>

## 4 Conclusion

In chapter 1 it is said that declaring otherwise lawful and legitimate regulatory state action invalid because it effects a harsh and excessive burden on one or a small group of property holders may not always be appropriate, especially when the regulatory measure serves a necessary and important public purpose. It would create a void if these excessive regulatory measures are declared invalid. Therefore,

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<sup>308</sup> AJ van der Walt "Constitutional property law" 2013 (2) *Juta's Quarterly Review* at 2.1.1. See also J Murphy "Interpreting the property clause in the Constitution Act of 1993" (1995) 10 *South African Public Law* 107-130 at 118.

<sup>309</sup> AJ van der Walt "Constitutional property law" 2013 (2) *Juta's Quarterly Review* at 2.1.1.

<sup>310</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 347; T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 33.

alternative approaches are considered that would save the excessive regulatory measure from being declared invalid. In this chapter one solution to the problem is considered, namely constructive expropriation or regulatory takings.<sup>311</sup> In terms of the doctrine of constructive expropriation, the excessive regulatory measure falls within a grey area between the uncompensated regulatory control of the use and enjoyment of property rights in terms of the state's police power and the expropriation of property in terms of the power of eminent domain, the latter of which requires the payment of compensation. The excessive regulatory measures that fall within this grey area are judicially transformed into expropriation of property that cannot be upheld without the payment of compensation.

In this chapter US, Irish and Swiss law is considered. These jurisdictions adopt some form of constructive expropriation approach in their respective legal contexts. The notion of regulatory takings was developed in the jurisprudence of the US Supreme Court. The term "taking" in the Fifth Amendment to the US Constitution does not only embrace formal expropriation of property but also regulatory interferences that has the same effect as expropriation. Courts are therefore able to uphold excessive regulatory measures by requiring the state to pay compensation to the adversely affected property holder. Almost similar to US law, the Irish Constitution does not distinguish between regulatory interferences and expropriation of property. The Irish courts are able to require compensation for expropriation as well as some regulatory interferences with property, but they do not use this construction to salvage regulatory interferences that impose an excessive burden on property owners – the latter are usually declared invalid.

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<sup>311</sup> See the discussion above regarding the difference in terminology.

The case law of US and Irish law illustrate the difficulty the courts in these respective jurisdictions experience in delimiting the precise boundary line between regulatory interferences that owners have to endure without the payment of compensation and the instances where regulatory interferences become too excessive and harsh that it cannot be upheld without compensation. In both jurisdictions the principle of fairness is emphasised when courts make the distinction between valid regulatory interferences with property rights and regulatory interferences that shades into regulatory taking or unjust attack of property that are invalid without the payment of compensation. However, it is argued that the notion of fairness is subjective and judges in the respective jurisdictions seldom agree. Therefore, the criteria used to determine whether regulatory taking or unjust attack occurred is often applied haphazardly, which leads to conflicting theories and outcomes. Neither the state nor property owners have certainty regarding their rights and obligations. The US and Irish case law illustrates the uncertainty that is associated with the notion of constructive expropriation. In this respect it is arguably not a good alternative solution to salvaging excessive regulatory measures that serve a necessary and important public purpose from invalidity. The conflicting theories regarding the criteria for the determination whether regulatory taking occurred and the controversial outcomes in US and Irish case law should be seen as a warning that the seemingly inevitable subjective notions of fairness of judges that are associated with the application of the doctrine of constructive expropriation might undermine the doctrine of precedent, which the South African Supreme Court of Appeal views as foundational to the South African Constitution.<sup>312</sup>

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<sup>312</sup> In *True Motives 84 (Pty) Ltd v Mahdi & Another* 2009 (4) SA 153 (SCA) para 100 the Supreme Court of Appeal emphasised the importance of the doctrine of precedent. It held that “[w]ithout precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule”.

Furthermore, the terminology used in the US and Irish constitutions allows for the recognition of constructive expropriation since compensation is not limited to state interferences that result in acquisition of the property by the state. The terms “taking” in US law and “unjust attack” in Irish law recognise the duty to pay compensation for a wider category of state interferences of property than formal expropriation. Regulatory interferences that have the same effect as expropriation are also included under the terms “taking” and “unjust attack”. The unique terminology of the US and Irish constitutions renders the notion of constructive expropriation appropriate to the respective legal contexts.

The legislature explicitly provided for a second category of expropriation in the Swiss Constitution, namely material expropriation. The concept of material expropriation in Swiss law is similar to the notion of constructive expropriation. The Swiss courts determined the criteria when a regulatory interference with property constitutes material expropriation which necessitates the payment of compensation as a validity requirement. The criteria the Swiss courts apply to determine whether material expropriation occurred are relatively simple and unproblematic. Material expropriation can present itself in two forms. Firstly, compensation is required if the regulatory measure imposes an excessive burden that results in a severe loss for the property holder. Secondly, if the regulatory interference forces an individual or small group of property owners to sacrifice the use and enjoyment of their property for the benefit of the public as a whole, compensation is required. The Swiss Constitution therefore provides statutory authority for the courts to uphold excessive regulatory measures. The Swiss example is unique and proves a difficult source of comparison with jurisdictions that do not have a similar provision in their constitutions.

The notion of constructive expropriation has been considered in South African law. Although the Constitutional Court has not expressly rejected the doctrine of constructive expropriation, the overview of South African case law above seems to indicate that recognition of such a doctrine is unlikely. The Constitutional Court's statement in *Reflect All* is probably the clearest indication of the Court's reluctance to develop such a doctrine.

Moreover, section 25 of the South African Constitution explicitly distinguishes between deprivation and expropriation of property. Although the boundary line between these two forms of state interference with property rights are not precisely defined, the Constitutional Court in *FNB* held that expropriation is a subset of deprivation. In this regard, the Court set out a methodology for the interpretation and application of section 25.<sup>313</sup> In terms of this methodology, a court, when faced with a constitutional challenge based on section 25, should first consider whether the interference complies with section 25(1) (is therefore authorised by law and is not an arbitrary deprivation of property) before it can consider whether the interference amounts to expropriation of property that has to be tested against section 25(2) of the Constitution. According to Roux, the implication of the *FNB* methodology is that issues that may have been considered at the expropriation stage of the property analysis are telescoped into the question whether there has been arbitrary deprivation of property under section 25(1).<sup>314</sup> Therefore, the application of the doctrine of constructive expropriation is arguably impossible in terms of the *FNB* methodology since excessive regulatory measures will most likely fail the non-

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<sup>313</sup> See the discussion in chapter 1 on the *FNB* methodology.

<sup>314</sup> T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 3; T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 270.



arbitrariness requirement in section 25(1) and never reach the expropriation stage of the property inquiry under section 25(2).

However, Van der Walt states that it cannot be assumed that the courts will always follow the *FNB* methodology strictly, in the sense of starting out with the non-arbitrariness analysis.<sup>315</sup> Even if the courts are willing to proceed directly to the expropriation analysis without first considering whether the deprivation was arbitrary, the recognition of constructive expropriation still seems impossible in light of the Constitutional Court's statement that state acquisition of the affected property is a fixed requirement for the establishment of expropriation.<sup>316</sup> The requirement of state acquisition for the establishment of expropriation negates the recognition of constructive expropriation since the type of regulatory deprivations that will generally fall within the category of constructive expropriation do not involve acquisition of the affected property to the state. Therefore, the absence of state acquisition will make it impossible for South African courts to uphold the excessive regulatory measures discussed in chapter 1 by transforming them into expropriation and requiring the state to pay compensation.

In conclusion, the doctrine of constructive expropriation is one solution to save excessive regulatory measures from being declared invalid for effecting arbitrary deprivation of property in conflict with section 25(1) of the Constitution. The comparative overview of US, Irish and Swiss law indicates that the constructive expropriation law approach has limited application in jurisdictions that do not have the same broad terminology or do not expressly provide for the category of constructive expropriation in their property clauses. Furthermore, the US and Irish

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<sup>315</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 225. See also the discussion in chapter 1 on the instances when the Constitutional Court will proceed directly to the expropriation analysis without first considering whether the deprivation was arbitrary.

<sup>316</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

case law illustrates that the doctrine of expropriation is problematic and creates legal uncertainty. In South African law, despite the courts' reluctance to recognise this doctrine, it seems unlikely if not impossible in light of the *FNB* methodology and the requirement of state acquisition before courts will recognise that expropriation has occurred.

Therefore, the constructive expropriation solution does not seem possible or appropriate in South African law. However, there are other alternative solutions in German, French, Dutch and Belgian law, which are discussed in chapter 3 that may save the excessive regulatory deprivations that serve a necessary and important public purpose from being declared invalid. The recognition of constructive expropriation is therefore not necessary in South African law.

## Chapter 3

### Non-expropriatory compensation in foreign law

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# 1 Introduction

As indicated in chapter 1, regulatory measures that result in individual property owners having to bear disproportionately harsh and excessive burdens for the sake of some public benefit would in principle be treated as arbitrary deprivations of property that are invalid for being inconsistent with section 25(1) of the 1996 Constitution. The Constitutional Court's decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>1</sup> (FNB) is the starting point in determining whether regulatory measures constitute arbitrary deprivation.<sup>2</sup> Judging from case law, the South African default approach to arbitrary and therefore unconstitutional deprivations is to declare the regulatory infringement invalid.<sup>3</sup>

However, it is stated in chapter 1 that it may not always be appropriate to declare an otherwise legitimate but excessive or unfair regulatory deprivation invalid. There may be circumstances where it may be necessary to save these regulatory deprivations because of the important public purpose they serve. Invalidity can sometimes have an adverse impact on the promotion or realisation of important and legitimate social and public benefits. The question that arises is therefore whether it is possible to salvage deprivations of property that might be declared arbitrary and invalid because they impose an excessively harsh and disproportionate burden on one or a small number of property owners, but that should be upheld because of the importance of the public interest that they serve. It was indicated in chapter 3 that one solution is to treat these regulatory deprivations as constructive expropriations

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<sup>1</sup> 2002 (4) SA 768 (CC).

<sup>2</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 8, 193; H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 242.

<sup>3</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 270.

which require compensation. This approach would both save the regulation and compensate the owner who was disproportionately affected by it. However, chapter 3 concludes that this solution might not be possible if it should turn out that constructive expropriation cannot be adopted in South African law. In chapter 3 it is argued that the doctrine of constructive expropriation is probably not suitable in the South African context. In that case a different solution will have to be found for those instances when it will be both inappropriate to invalidate the excessive regulatory measure but also unfair to expect an individual property owner to bear the harsh and disproportionate burden that results from a regulatory measure in the public interest without compensation.

In this chapter two similar but slightly different alternative approaches are considered, namely equalisation measures (in German law) and compensation based on the principle of equality before public burdens (in Belgian and Dutch law). These jurisdictions were all influenced by French law but German law eventually adopted a stricter and narrower approach than that followed in Belgian and Dutch law. The German equalisation approach is analysed and evaluated in comparison to the Belgian and Dutch approach, according to which compensation can be claimed in terms of the principle of equality before public burdens. Both approaches involve strategies by which an otherwise valid and legitimate but excessive or disproportionate regulatory limitation of property rights is salvaged by requiring that it be accompanied by compensation that is non-expropriatory in nature. The compensation requirement is usually regulated by statute.

Apart from explaining the different solutions of the two approaches discussed here, the comparative overview in this chapter has a second purpose. It is not possible to award compensation for every loss that results from a legitimate

regulatory infringement of property rights in terms of the state's police power. A comparative overview may help identify when a regulatory burden is considered excessive and disproportionate and when it is necessary for compensation to accompany a regulatory deprivation imposed to promote a legitimate and important public purpose; and when the excessive regulatory measure is invalid and cannot be salvaged by the payment of compensation.

## 2 The equalisation solution in German law

### 2 1 Introduction

Article 14 contains the property clause, which forms part of the Bill of Rights (*Grundrechtskatalog*) in the German Basic Law 1949 (*Grundgesetz*).<sup>4</sup> The Basic Law authorises the legislature to determine the limit and content of property rights.<sup>5</sup> The fulfilment of this obligation imposes a twofold responsibility, namely to make rules of private law aimed at the protection and transfer of property and secondly, to protect and promote the public interest, which is mainly achieved by regulation in public law.<sup>6</sup>

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<sup>4</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 122-123 explains that the correct translation for *Grundgesetz* is "Basic Law" rather than "Constitution". Article 14 consists of three sub clauses. Article 14.1 can be divided into two subsections, namely 14.1.1 and 14.1.2. Article 14.1.1 contains the property guarantee, which must be read together with the qualifications in article 14.1.2, 14.2 and 14.3. Article 14.2, read with article 14.1.2, contains the regulation clause and article 14.3 the expropriation clause.

<sup>5</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 601 Rdn 54; HJ Papier "Art 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 26. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 258; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 281. H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 247-248 states that the Basic Law requires in express terms that the legislature, and the judiciary by implication, define the ambit and scope of property (*Eigentum*) for purposes of constitutional protection.

<sup>6</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 601 Rdn 54; HJ Papier "Art 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 26 Rdn 4. See also H Mostert "Engaged citizenship and the

The inclusion of a property guarantee in the Bill of Rights does not prevent the state from limiting individual property rights; it merely restricts the state's powers by laying down requirements for valid state interferences with property.<sup>7</sup> Any regulation of fundamental rights in the Bill of Rights is subject to the overarching values, namely human dignity, personality and equality, which inform the meaning of the entire Basic Law.<sup>8</sup> The Constitutional Court elevated these rights to the rank of highest values of the legal system and views them not only as rights but also as objective principles that permeate the whole legal order, from public law to private law and the interpretation of ordinary law.<sup>9</sup> Grimm points out that "[t]he function of constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity".<sup>10</sup>

Furthermore, the legislative duty to determine the content (*Inhalt*) and limits (*Schranken*) of property rights respectively must also be understood in their relation to the purpose of the property guarantee and the distinction between the institutional guarantee and the individual guarantee.<sup>11</sup> The institutional guarantee

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enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 248; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 292; DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 259; GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 168.

<sup>7</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 128.

<sup>8</sup> DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 254. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 125 states that human dignity enjoys a measure of priority over other rights in the Bill of Rights. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 287; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 110-111.

<sup>9</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 387.

<sup>10</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 391.

<sup>11</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 131-132. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007)



(*Institutionsgarantie*) is associated with the positive statement in article 14.1.1 and is concerned with protecting the institution of private property as such.<sup>12</sup> The institutional guarantee ensures the protection of core legal norms which describe the essence of property and guarantees that the state does not erode or abolish this core.<sup>13</sup> Therefore, the institutional guarantee prevents the state from eliminating or removing whole categories of property objects from the sphere of private property without a constitutionally acceptable justification.<sup>14</sup> In determining the content of property rights, the legislature concerns itself with the preservation of existing property institutions and the establishment of new property institutions, and in this process the legislature is restricted by the institutional guarantee of property.<sup>15</sup>

The individual guarantee (*Bestandsgarantie*), on the other hand, is associated with the negative aspects of the property guarantee contained in articles 14.1.2, 14.2

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582-639 at 604 Rdn 55; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 81; GS Alexander "Property as a fundamental constitutional right? The German example" (2003) 88 *Cornell Law Review* 733-778 at 755-757.

<sup>12</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 129. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 601 Rdn 55; HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 181 Rdn 332; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 82; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 114; GS Alexander "Property as a fundamental constitutional right? The German example" (2003) 88 *Cornell Law Review* 733-778 at 739, 746.

<sup>13</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 129. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 602 Rdn 60, 90; HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 181 Rdn 335; DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 252-253; BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 77. H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 82 describes that the core elements of the property concept are, for example its existence, availability and usefulness for individuals.

<sup>14</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 129, 132. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 602 Rdn 60; HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 182 Rdn 335; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 83.

<sup>15</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 132-133. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 286.

and 14.3, which authorise the state to regulate and expropriate property rights.<sup>16</sup> The individual guarantee allows the state to interfere with property rights but simultaneously lays down the boundaries of and requirements for valid interferences.<sup>17</sup> The state may only interfere with individual property rights in accordance with legal requirements and for a public purpose which justifiably overrides the individual property guarantee.<sup>18</sup> Therefore, the individual property guarantee is aimed at protecting individual property owners against regulatory excess (*Übermaßverbot*), namely to prevent disproportionate effects of regulation on individual holdings.<sup>19</sup> In the determination of the limits of property rights, the legislature is concerned with the exercise of individual property rights and the limits thereof, and in this process the legislature is restricted by the individual guarantee of property.<sup>20</sup> The focus of this is primarily on the individual guarantee of property, since this study concerns regulatory state actions that are lawful and legitimate on an institutional level but the relevant regulatory measure is exercised in a way that may offend the individual guarantee of property.

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<sup>16</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 128-130. Van der Walt explains that the institutional guarantee is concerned with state interference of property in general, for example land, water or minerals; whereas the individual guarantee is more concerned with state interference with property rights in a specific piece of land, or specific water use right, or specific mineral right to secure existing property holdings against improper deprivation. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 604 Rdn 70; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 81-82.

<sup>17</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 128. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 604 Rdn 70.

<sup>18</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 128-129. See also R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 605 Rdn 73.

<sup>19</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 602 Rdn 60. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 83.

<sup>20</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 133.

The individual guarantee and the restrictions on the legislature's power to determine the limits of property rights are reinforced by the proportionality principle.<sup>21</sup> In German law, a law can violate the Constitution not only when it goes too far in limiting a fundamental right (*Übermaßverbot*) but also when it does too little to protect a fundamental right (*Untermaßverbot*).<sup>22</sup> A regulatory limitation that goes too far in regulating the boundaries of either the individual or the institutional guarantee results in invalidity of the regulatory measure.<sup>23</sup>

## 2.2 The proportionality principle (*Verhältnismäßigkeit*)

Article 14.1.2 provides that the content and limits of property rights shall be defined by law. The legislature may regulate property, but only to the extent authorised by the Basic Law.<sup>24</sup> Although the Basic Law creates the legislative duty to establish and maintain an equitable property regime, it simultaneously limits the legislature's powers to regulate property by prohibiting regulatory excess (*Übermaßverbot*).<sup>25</sup> The social obligation (*Sozialnützigkeitsgebot*) in article 14.2 is continuously applicable in

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<sup>21</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 365 states that although the proportionality principle is not expressly mentioned in the Basic Law, it is derived from the rule of law principle and forms a fundamental aspect of German constitutional jurisprudence. See also GS Alexander "Property as a fundamental constitutional right? The German example" (2003) 88 *Cornell Law Review* 733-778 at 749; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 142; DP Currie *The Constitution of the Federal Republic of Germany* (1994) 307.

<sup>22</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 392.

<sup>23</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 605 Rdn 73, 75; HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 36 Rdn 28.

<sup>24</sup> HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 183 Rdn 337.

<sup>25</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 132. See H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 260, 287.

the determination of the content and limits of property rights under article 14.1.2.<sup>26</sup> According to the Federal Constitutional Court, the social obligation of ownership is intended to fortify the idea that ownership is not absolute and that property rights are always subordinate to the public interest.<sup>27</sup> The fundamental principles underlying the property clause that inform the institutional and individual guarantees provide protection against excessive regulation by the legislature.<sup>28</sup> Therefore, the dual task of the legislature, namely to protect existing property rights and at the same time protect and promote the public interest, should be seen against the dual function of the property guarantee.<sup>29</sup>

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<sup>26</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 602 Rdn 59, 605 Rdn 72. Wendt states that there is a view that article 14.2 creates direct legal duties for property owners. However, there are in fact very little duties recognised as binding in relation to the legitimate use of property. ("Demgegenüber würde die Auffassung, Art 14.2 erzuege (auch) unmittelbar Rechtspflichten des Eigentümers, dazu führen, dass in Wahrheit weniger die Pflichtenbindung als der Eigentumsgebrauch für legitimerungsbedürftig erklärt würde.") See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 253; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 133. DP Currie *The Constitution of the Federal Republic of Germany* (1994) 290-291 explains that the social obligations of property have been held to permit considerable regulation. In *BVerfGE* 89, 1 (1993) (*Besitzrecht des Mieters*) para 18 the Federal Constitutional Court held that although the social obligation imposes a constitutional duty on property owners to serve the well-being of the community, it does not in itself create subjective property rights. See also GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 97; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 139. GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 168 argue that the social obligation imposes a duty on property owners to tolerate the limitation of their property rights without having a right to compensation. However, an exception to this duty exists when the burden imposed by the regulatory measure is so extreme that it cannot be expected of the property owner to tolerate it without compensation.

<sup>27</sup> *BVerfGE* 51, 1 (1979) (*Kleingarten*). See also GS Alexander "Property as a fundamental constitutional right? The German example" (2003) 88 *Cornell Law Review* 733-778 at 750; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 133.

<sup>28</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 602 Rdn 59, 605 Rdn 73. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 82-83. L Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – a comparative analysis" (1999) 14 *South African Public Law* 178-215 at 178, 180 states that there is no general limitation clause in the Basic Law that applies to all fundamental rights. Instead, the German Bill of Rights regulates the limitation of each fundamental right individually. The principle of proportionality is applicable once it has been determined that a fundamental right may legally be restricted. See also HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 183 Rdn 337.

<sup>29</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 292. See also BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 69; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 132.

Moreover, any limitation of a fundamental right in the Bill of Rights also has to comply with article 19 of the Basic Law.<sup>30</sup> Article 19.1 contains formal requirements for restrictions on such rights, and article 19.2 provides an outer restriction on the legislature's constitutional authority to limit any fundamental right.<sup>31</sup> In addition to article 19, the Basic Law attaches special limitation clauses to most rights and freedoms in the Bill of Rights.<sup>32</sup> However, Grimm points out that laws are more often found to be unconstitutional for violating the proportionality principle than because they violate the written limitation clause.<sup>33</sup> Therefore, it is the unwritten proportionality

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<sup>30</sup> L Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – a comparative analysis" (1999) 14 *South African Public Law* 178-215 at 180 states that article 19 provides general guidelines for the limitation of fundamental rights. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 261; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 159. See [http://www.gesetze-im-internet.de/englisch\\_gg/englisch-gg.html](http://www.gesetze-im-internet.de/englisch_gg/englisch-gg.html) (accessed 20.02.2013) for the English translation of article 19:

"(1) [i]nsofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected".

<sup>31</sup> R Wendt "Eigentum, Erbrecht und Enteignung" in M Sachs (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 602 Rdn 57; HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 182 Rdn 333. See also GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 122. H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 261 states that the article 19(1) constitutes the *Schranken-Schranken* in the German constitutional dogmatic structure. *Schranken-Schranken* refers to the fact that the legislature, in exercising its power to limit specific basic rights, may only act within the borders of limitation set by the Basic Law. L Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – a comparative analysis" (1999) 14 *South African Public Law* 178-215 at 181, 187 argues that article 19(2) does not bind only the legislature but the executive and the judiciary as well. The protection afforded by article 19(2) ensures that no fundamental right may be restricted to such an extent that only an empty shell remains, regardless of the existence of a pressing need of public interest. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 261-262. Section 19(2) seems to reinforce the institutional guarantee of property in article 14.1.1 of the Basic Law.

<sup>32</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 386. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 158; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 263.

<sup>33</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 386. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 160-161.



principle that primarily functions as the protection of fundamental rights against excessive regulation in German law.<sup>34</sup>

The proportionality principle, although not explicitly mentioned in the Basic Law, fulfils a fundamental role in German constitutional jurisprudence.<sup>35</sup> According to the Federal Constitutional Court, the textual basis for the proportionality principle is found in the principle of the rule of law (*Rechtsstaat*).<sup>36</sup> Grimm points out that the proportionality test is older than the Basic Law.<sup>37</sup> Grimm also emphasises that the Federal Constitutional Court has never elaborated on the precise source of the proportionality principle or how it flows from the rule of law.<sup>38</sup> A possible reason for this may be the Court's initial uncertainty as to role the proportionality would play in

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<sup>34</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 386. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 262.

<sup>35</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 365; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 142. See also GS Alexander "Property as a fundamental constitutional right? The German example" (2003) 88 *Cornell Law Review* 733-778 at 749; DP Currie *The Constitution of the Federal Republic of Germany* (1994) 307.

<sup>36</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 385. See also GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 133-134; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002); AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 161; L Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – a comparative analysis" (1999) 14 *South African Public Law* 178-215 at 191-193; DP Currie *The Constitution of the Federal Republic of Germany* (1994) 309. M Cohen-Eliya & I Porat "American balancing and German proportionality: The historical origins" (2010) 8 *International Journal of Constitutional Law* 263-286 at 272 explain that the proportionality principle corresponds to the *Rechtsstaat* principle and also complements it. The *Rechtsstaat* principle allows the state to interfere with individual rights but only to the extent that such interference is explicitly authorised by law. The proportionality principle limits this power further, permitting the state to exercise only those measures that are necessary to achieve its legitimate goals.

<sup>37</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 384. A Barak *Proportionality: Constitutional rights and their limitations* (2012) 177 argues that the proportionality principle has its historical roots in 18<sup>th</sup> century German administrative law. Furthermore, Barak states that most German commentators argue that Carl Gottlieb Svarez (1746-1798) was, more than anyone else, responsible for the development of modern proportionality (footnotes omitted).

<sup>38</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 386.

the future, but once its prominence became apparent, the principle had already been established, which negated the need for further reasoning.<sup>39</sup>

The constitutionality of state regulation of property is premised on the upholding of the proportionality principle.<sup>40</sup> The proportionality principle requires that an equitable balance must be established between the interests of individual property holders and the public interest.<sup>41</sup> It ensures that regulatory restrictions on property are justified and prohibits the imposition of a disproportionate burden on property owners. A burden may be disproportionate either for being unsuitable for the regulative purpose it seeks to achieve or because it imposes a heavier burden than is required or justified by the purpose for which it is imposed.<sup>42</sup>

The proportionality test consists of three steps.<sup>43</sup> Firstly, the purpose of the law is considered. According to Grimm, ascertaining the purpose is not part of the

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<sup>39</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 386.

<sup>40</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 289.

<sup>41</sup> HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 175 Rdn 315. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 133, 135 states that "[t]he function of the proportionality principle ... is to ensure that the regulation starts with but also ends with the public interest, and that it respects and protects both the public interest and the individual interests equally". See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 262; DP Currie *The Constitution of the Federal Republic of Germany* (1994) 295. L Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – a comparative analysis" (1999) 14 *South African Public Law* 178-215 at 193 argues that the meaning and content of the principle of proportionality depends on its application. The principle of proportionality does not only find application as a norm of constitutional interpretation, but is also applied with reference to the drafting of legislation and the exercise of administrative discretion.

<sup>42</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 140.

<sup>43</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 387. See also HJ Papier "Art. 14" in T Maunz & G Dürig (eds) *Grundgesetz Kommentar* Vol 2 (2002) 1-376 at 175 Rdn 315; A Barak *Proportionality: Constitutional rights and their limitations* (2012) 180; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 134; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 289; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 135; AJ van der Walt "Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings" (1999) 14 *South African Public Law* 273-331 at 288; L Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and



proportionality test but merely a starting point.<sup>44</sup> The second step considers whether the law is necessary or whether less invasive means exist that will achieve the same purpose. The third step requires that the burden should be proportionate to the benefits to be achieved from the limitation's purpose. Not many laws fail the test in the first or second step as they merely require that the purpose sought to be achieved should be legitimate in the sense of not being prohibited by the Constitution.<sup>45</sup> The last requirement, namely proportionality in the narrow sense,<sup>46</sup> applies in the final stage of the inquiry. This requirement is not intended to provide the courts with the opportunity to second-guess the wisdom of the legislature but rather to make sure that the legislature did not exceed its legislative competence.<sup>47</sup> Therefore, the proportionality principle gives rise to the prohibition of excessive regulation.<sup>48</sup>

The practical effect of the prohibition against excessive regulation and the way it is derived from the proportionality principle is illustrated by the so-called "grading" or "scaling" of social limitations of property according to its relation to the property

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the doctrine of *Güterabwägung* – a comparative analysis" (1999) 14 *South African Public Law* 178-215 at 194.

<sup>44</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 388.

<sup>45</sup> D Grimm "Proportionality in Canadian and German constitutional jurisprudence" (2007) 57 *Toronto Law Journal* 383-397 at 388-389. See also M Cohen-Eliya & I Porat "American balancing and German proportionality: The historical origins" (2010) 8 *International Journal of Constitutional Law* 263-286 at 285.

<sup>46</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 295-296 distinguishes between proportionality in the wider sense and proportionality in the narrow sense. Proportionality in the wider sense requires an appropriate relationship between the concepts of private property and public interest, whereas proportionality in the narrow sense is concerned with the suitability of a specific interference for a specific purpose.

<sup>47</sup> GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 135.

<sup>48</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 290.

holder and its social function (*Abstufung der Sozialpflichtigkeit*).<sup>49</sup> Mostert emphasises that the property guarantee in article 14 does not distinguish between different kinds of property.<sup>50</sup> Instead, the level of scrutiny of property right infringements varies according to the nature of the property and its importance to the individual as well as the public at large.<sup>51</sup> This means that the closer a specific property right is to the personal liberty of its holder, the more the legislature is restricted in interfering with that right. However, the further a specific right is removed from the sphere of the holder's personal liberty, the easier it becomes for the legislature to regulate the limits of that right.<sup>52</sup> The effect of this "grading" or "scaling" approach is that certain types of property can be subjected to stricter, more far-reaching regulation because the public interest in regulating those properties is greater than the individual interest in not having them regulated. The "grading" or

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<sup>49</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 135. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 242, 297.

<sup>50</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 242.

<sup>51</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 297, 242.

<sup>52</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 297. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 135, 140 explains that the "scaling" approach is based on the fact that the social interests affected by the use of the property extends beyond only those of the holder's interests, especially when the property is further away in relation to the individual property holder's sphere of personal liberty. See GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 102-103, 112, 135-138 for a discussion on the underlying reasons behind property protection and the varying degree of protection afforded to different types of property rights. See also GS Alexander "Property as a fundamental constitutional right? The German example" (2003) 88 *Cornell Law Review* 733-778 at 738-739, 769. In a comparison between the protection of property as a fundamental right entrenched in the German and American constitutions, Alexander pays particular attention to the question of purposive and contextual issues that underlie the recognition of interests as property and the degree of protection afforded to such interests. The "grading" or "scaling" approach serves as a good example to illustrate this point. The German Basic Law does not treat property as a fundamental right across the board. It rather treats property as a fundamental right, accorded with the highest degree of protection, but only in cases in which the affected interest immediately at stake implicates the owner's ability to act as an autonomous moral and political agent. These interests are strongly protected because these interests serve other primary constitutional values, in particular human dignity and self-realisation. According to Alexander, German jurisprudence indicates that the degree of property protection against regulatory infringements is stronger in instances where the interests immediately affected serves a personal or social function rather than an economic, wealth-creating function. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 297-298.

“scaling” approach is therefore used to determine the extent to which the legislature may legitimately limit a particular property right.

The social relevance of a specific kind of property is dependent on time and place, but this assessment does not affect the concept of property in private law. Furthermore, taking the social relevance of a specific kind of property into account when scrutinising the constitutional validity of a particular regulatory interference with such property does not render socially relevant property more or less valuable than property without any particular social relevance.<sup>53</sup> Instead, it merely influences the courts’ and the legislature’s obligation to consider certain issues when attempting to regulate specific kinds of property.<sup>54</sup> For example, land is an indispensable and limited resource of great social import and can therefore be subjected to far-reaching social regulation.<sup>55</sup> An example relating to land is the legislation regulating the landlord and tenant relationship.<sup>56</sup> The “grading” or “scaling” approach was applied by the Federal Constitutional Court in a number of decisions dealing with rent control legislation, which was enacted during a period of dire housing shortages. For example, in the *Besitzrecht des Mieters*<sup>57</sup> decision the Federal Constitutional Court had to consider whether a lessee of residential property could claim protection in terms of article 14 of the Basic Law against the lessor’s right to cancel the lease. The

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<sup>53</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 298.

<sup>54</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 298.

<sup>55</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 136. See also AJ van der Walt “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 *South African Public Law* 273-331 at 288; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 298; H Mostert “Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law” (2010) 127 *South African Law Journal* 238-273 at 248.

<sup>56</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 136.

<sup>57</sup> BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*). For an English discussion of the case, see AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 138-139.

lessor was elderly and in poor health and claimed she needed the apartment for her son to be closer at hand when she needed him.<sup>58</sup> The Court held that the lessee had a property right just like the lessor, which was protected by article 14.1.1.<sup>59</sup> The Court held that a person's home was the centre of his private existence.<sup>60</sup> Therefore, the legislature has a duty to ensure that both the lessor and the lessee's property interests were harmonised when it regulated the content and limits of property rights in terms of article 14.1.2.<sup>61</sup> The Court also held that a lessor may only cancel the lease if the purpose for the cancellation was reasonable and feasible.<sup>62</sup> The decision illustrates that the social relevance of the rental property in relation to the sphere of individual liberty of the owner and the lessee respectively is a primary consideration in the courts' determination of whether the particular rent control legislation and its application are proportionate.<sup>63</sup>

The individual property guarantee and the restriction it imposes on the legislature in determining the limits of property rights is reinforced by the proportionality principle, which requires the legislature to establish and maintain a fair balance between individual property interest and the public interest.<sup>64</sup> The effect of a finding that a regulatory measure goes too far and disrupts this proportionate balance led to the development of controversial approaches in the Civil and Administrative Courts, both of which awarded compensation for the effect that excessive regulatory measures had on property owners. Subsequently, the Federal Constitutional Court

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<sup>58</sup> BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*) para 3. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 138.

<sup>59</sup> BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*) para 19. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 139.

<sup>60</sup> BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*) para 21.

<sup>61</sup> BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*) para 27.

<sup>62</sup> BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*) para 32. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 139.

<sup>63</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 139.

<sup>64</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 133.

rejected these approaches and declared that disproportionate and excessive regulatory measures which are unconstitutional and therefore invalid.

## 2 3 *The development of the equalisation solution*

### **2 3 1 *Two initial solutions involving compensation instead of invalidity***

The consequences that follow a finding that the legislature exceeded its legitimate legislative power may vary. Above it is mentioned that excessive regulation constitutes one example where the legislature exceeds its legitimate legislative authority. Initially it was said that a regulatory infringement of property may be excessive either because it constitutes an expropriation-like infringement (*enteignender Eingriff*) or because it constitutes a quasi-expropriatory infringement (*enteignungsgleicher Eingriff*). The consequences differ according to the type of infringement. An *enteignender Eingriff* refers to a regulatory measure that directly interferes with the property rights of the affected individual to such an extent that he is expected to make a special sacrifice.<sup>65</sup> This type of infringement is usually the unintended, unexpected and unforeseen side-effect of an otherwise lawful and legitimate regulatory measure and generally it is considered appropriate that these regulatory measures should give rise to a claim for compensation.<sup>66</sup> The notion of an *enteignungsgleicher Eingriff*, on the other hand, refers to infringements of property

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<sup>65</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 281.

<sup>66</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 282. See also F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 135; BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 75-76; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 141-142, 325; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 116. See also the discussion in U Kischel "Wann ist die Inhaltsbestimmung ausgleichspflichtig?" (2003) 58 *JuristenZeitung* 604-613 at 604-605.

rights that result from a regulatory state action that is not properly authorised; or where the state omitted to act where it had a legal duty to do so and an infringement resulted from this omission.<sup>67</sup> These types of regulatory interferences are illegal and unlawful and therefore constitutionally invalid.<sup>68</sup> It is not possible for the property owner to accept the *enteignungsgleicher Eingriff* on the condition that compensation is paid.<sup>69</sup> The only remedy the affected owner has in this case is to challenge the constitutional validity of the regulatory limitation.

However, even the unintended *enteignende Eingriffe* can be doctrinally problematic, especially with regard to the structure of article 14 of the Basic Law. German law, with regard to this type of regulatory infringement, could have developed in the same way as US and Irish law, to recognise something like constructive expropriation.<sup>70</sup> At some point it looked as if the courts, especially the civil courts, were treating *enteignende Eingriffe* as instances of constructive expropriation. In German law the civil, constitutional and administrative courts have jurisdiction in matters pertaining to expropriation.<sup>71</sup> As a result, the respective courts'

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<sup>67</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 282. See also F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 135. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 141-142, 325; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 116.

<sup>68</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 282. See also F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 135. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 141-142; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 116.

<sup>69</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 306. See also BVerfGE 58, 300 (1981) (*Naßauskiesung*).

<sup>70</sup> See the discussion on constructive expropriation in chapter 2.

<sup>71</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 122-123 discusses the German court structure and the jurisdictions of the various courts. He identifies that the following courts are of particular interest for purposes of article 14: The Federal Court of Justice in Civil Matters (*Bundesgerichtshof*, cited as the *BGH* in case law), which is the highest "ordinary" civil court, has jurisdiction with regard to the compensation that is payable upon expropriation; the Federal Administrative Court (*Bundesverwaltungsgericht*, cited as *BVerwG* in case law), which is the highest administrative court, has jurisdiction with regard to the validity of administrative actions and decisions; and lastly the Federal Constitutional Court (*Bundesverfassungsgericht*, cited as *BVerfG* in case law)



analytical approaches to regulation and expropriation were not always consistent. Furthermore, the different courts developed and applied different theories in determining issues related to the compensation for the regulation and expropriation of property.<sup>72</sup>

The civil courts developed and applied the doctrine of individual sacrifice (*Sonderopfertheorie*), which determined that a regulatory interference with property constitutes expropriation that requires compensation if the infringement breaches the principle of equality.<sup>73</sup> The principle of equality is infringed when a regulatory measure singles out a specific owner or a small group of owners to bear a burden that should generally be borne by the public as a whole.<sup>74</sup> The civil courts' approach led to the broadening of the notion of expropriation and thereby inevitably extended the compensation requirement for formal expropriation to regulatory actions that were

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has jurisdiction with regard to all constitutional matters, especially whether legislation, state action and other federal or lower courts' jurisprudence are in conformity with the Basic Law. See also H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 311.

<sup>72</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 311. See also GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 116.

<sup>73</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 311. See also M Albrod *Entschädigungsbedürftige Inhalts- und Schrankenbestimmungen des Eigentums nach Artikel 14 1, 2 GG* (1995) 1.

<sup>74</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 311. See also F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 142 states that a *Sonderopfer* manifests itself in a "*den einzelnen ungleich belastenden Eingriff von hoher Hand*" (an unequal burden that results from a particular infringing state action). MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 205 points out that the *Sonderopfer* theory bears some similarities to the *égalité* principle. See the discussion on the *égalité* principle below. H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 249 explains that the doctrine originated from the idea that expropriation requires a special sacrifice from the individual landowner, which goes against the principles of equality and therefore needs to be evened out. The doctrine introduced the criterion of an "unacceptable, unreasonable and extraordinary sacrifice" (*unzumutbare Sonderopfer*) to determine whether compensation for expropriation was necessary. See also BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 71; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 141.



deemed to have created an unusual sacrifice, although the particular interference did not constitute an expropriation in the strict sense.<sup>75</sup>

By contrast, the administrative courts developed and applied the doctrine of intensity (*Schweretheorie*), which took into account the intensity of the regulatory measures directed against the property, together with the extent of the burden imposed on the individual owner to determine whether the proportionality principle has been breached.<sup>76</sup> If the proportionality principle has been breached, the regulation of property could not be justified without compensation.<sup>77</sup>

In effect, both approaches resembled the notion of constructive expropriation in the sense that they construed an expropriation on the basis of what was perceived, in two different ways, as excessive non-expropriatory, regulatory measures. Mostert points out that although the *Schweretheorie* was more widely supported than the *Sonderopfertheorie*, both these theories were criticised because neither explained why certain owners were forced to suffer the regulatory interference of their property without compensation, whilst others were entitled to compensation, or did not have to suffer the same kind of infringement.<sup>78</sup> However, the approach to *enteignende Eingriffe* in German law was drastically changed in the *Naßauskiesung* decision

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<sup>75</sup> F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 326. See also BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 85.

<sup>76</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 311-312. See also M Albrod *Entschädigungsbedürftige Inhalts- und Schrankenbestimmungen des Eigentums nach Artikel 14 1, 2 GG* (1995) 1; BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 78.

<sup>77</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 312. See also H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 250. GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 118 explains that the doctrine of intensity was used "as a means of determining that a particular regulatory limitation on property would be disproportionate but for the cushioning effect of a state conferred equalization benefit".

<sup>78</sup> H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 312-313.

when the Federal Constitutional Court had the opportunity for the first time to clarify the inconsistent approaches to the determination of regulation and expropriation of property that had developed in the civil and administrative courts.

### **2 3 2 The constructive expropriation solution is rejected: The *Naßauskiesung* decision<sup>79</sup>**

The plaintiff in this case had owned and operated a quarry since 1936. He extracted gravel from below the groundwater level (*Naßauskiesung*), thereby creating a manmade lake in the quarry. In terms of an amendment to the Federal Water Resources Act of 1957 (the Act),<sup>80</sup> landowners were required to obtain a permit to use any surface or groundwater. The Act sought to preserve public water supplies from contamination or other uses that were damaging to the public welfare. Existing rights were provided for by way of a continuation of an existing permit, or a new permit, or compensation for the loss of an existing permit. The plaintiff's application to continue using the groundwater on his property for purposes of extracting gravel was denied.<sup>81</sup> The reason given by the authority for its refusal of the plaintiff's application was that the distance from the quarry to the Waterworks' water plant was only 120m, which created the risk that any contamination of the flooded gravel pit could easily

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<sup>79</sup> For a discussion of the case refer to AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 142-145; H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 251-252; DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 257-261; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 118-119, 139-147; BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 85-95.

<sup>80</sup> *Wasserhaushaltsgesetz – WHG* 16.02.1976 (BGBl S 3017).

<sup>81</sup> *BVerfGE* 58, 300 (1981) 309.

spread to the city's water wells and endanger public water safety.<sup>82</sup> The plaintiff approached the courts and argued that the authority's refusal to grant him a permit constituted an expropriation which entitled him to compensation.<sup>83</sup> The Federal Court of Justice in Civil Matters referred the case to the Federal Constitutional Court to determine whether the Act, which was meant to determine the content and limits of property rights in terms of articles 14.1.2 and 14.2, was perhaps unconstitutional because the restriction of the landowner's rights with regard to the use of groundwater went too far (in terms of the prohibition against excessive regulation or *Übermaßverbot*). The Federal Court of Justice upheld the plaintiff's claim on the basis that the refusal of the plaintiff's application to extract gravel from the groundwater on his property constituted an *enteignender Eingriff* which required the payment of compensation.<sup>84</sup> This was in line with previous judgments in which the Federal Court of Justice held that the refusal of a water permit in terms of the Act for the purpose of gravel extraction effected expropriation if the pre-existing gravel extraction was not only economically reasonable but could also be realised.<sup>85</sup>

In this decision, the Federal Constitutional Court addressed the different approaches to the determination of regulation and expropriation of property that had developed in the administrative and civil courts. The Federal Constitutional Court set out the jurisdiction of the various federal courts with regard to aspects of the constitutional property guarantee. The Court held that the civil courts' jurisdiction was restricted to the amount of compensation for expropriation, which means that a valid

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<sup>82</sup> BVerfGE 58, 300 (1981) 309.

<sup>83</sup> BVerfGE 58, 300 (1981) 309. BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 85 points out that the plaintiff did not approach the administrative courts. Instead, he approached the civil courts and claimed compensation for the refusal of the relevant authority to grant him a water permit in terms of the Act.

<sup>84</sup> BVerfGE 58, 300 (1981) 330.

<sup>85</sup> BVerfGE 58, 300 (1981) 330.

expropriation should already exist.<sup>86</sup> There was therefore no justification for the civil courts' *Sonderopfertheorie* approach in which the court awarded compensation for regulatory deprivations that imposed an excessive and harsh burden on an individual property owner (*enteignende Eingriffe*).<sup>87</sup> The civil courts were not allowed to indirectly transform what they saw as excessive regulatory actions into expropriation by awarding compensation. The validity requirements for expropriation are set out in article 14.3 of the Basic Law. According to the Court, the most important requirement in this regard is that expropriation should be authorised by valid law, which must set out the nature and measure of compensation to be paid for expropriation.<sup>88</sup> The Court emphasised that this *Junktim-Klausel* (linking clause) means that a regulatory statute, which does not provide for compensation, cannot be used to found a claim for compensation based on expropriation.<sup>89</sup> Therefore, the correct approach to regulatory limitations that exceed the scope of legitimate legislative regulatory power is not to claim compensation but to attack the validity of the law or action in the administrative courts.<sup>90</sup> The Court held that the administrative courts have jurisdiction with regard to the validity of administrative decisions and actions pertaining to expropriation.<sup>91</sup> However, when the constitutionality of legislation, state actions or court decisions is challenged, the matter should be referred to the Federal Constitutional Court.<sup>92</sup> The administrative courts do not have the power to transform a regulatory action that is invalid for exceeding the scope of the regulatory power into an expropriation by awarding compensation.

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<sup>86</sup> BVerfGE 58, 300 (1981) 323.

<sup>87</sup> BVerfGE 58, 300 (1981) 324.

<sup>88</sup> BVerfGE 58, 300 (1981) 323.

<sup>89</sup> BVerfGE 58, 300 (1981) 324.

<sup>90</sup> BVerfGE 58, 300 (1981) 324.

<sup>91</sup> BVerfGE 58, 300 (1981) 322-323.

<sup>92</sup> BVerfGE 58, 300 (1981) 323.

The question before the Court was therefore whether the Federal Water Resources Act was in accordance with article 14 of the Basic Law. The Federal Court of Justice's approach was premised on the assumption that groundwater formed part of the landowner's property as meant by § 905 of the *Bürgerliches Gesetzbuch* (*BGB*) (Civil Code) and that the property owner's right in respect to the groundwater found on his property was significantly limited by the Act.<sup>93</sup> The commencement of the Water Resources Act detached groundwater from landownership and abolished the private landowner's private ownership of groundwater and also limited the landowner's access to the groundwater.<sup>94</sup> Furthermore, the Federal Court of Justice adhered to the legal view that the right to property included every possible and economically reasonable use of that property, as determined by §903 *BGB*.<sup>95</sup> Any interference with such an economically reasonable use of the property must therefore be treated as an interference that diminishes the landowner's ownership. However, the Federal Constitutional Court held that this legal perspective could not be maintained.<sup>96</sup> The Court stated that the legal view that the private law right to property conferred by the *BGB* took priority over the public law right to property entrenched in the Basic Law did not correspond with the Basic Law.<sup>97</sup> The right to property as guaranteed in the Basic Law must be derived from the Basic Law itself, it cannot be derived from legal norms that rank lower than the Basic Law. Furthermore,

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<sup>93</sup> *BVerfGE* 58, 300 (1981) 310, 330. §905 *BGB* provides "[d]as Recht des Eigentümers eines Grundstücks erstreckt sich auf den Raum über der Oberfläche und auf den Erdkörper unter der Oberfläche" (The right of the owner of a plot of land extends to the space above the surface and to the subsoil under the surface). See [www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3642](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3642) (accessed on 18.07.2014) for an official translation of the German Civil Code (*BGB*).

<sup>94</sup> *BVerfGE* 58, 300 (1981) 328, 323.

<sup>95</sup> *BVerfGE* 58, 300 (1981) 334. §903 *BGB* provides "[d]er Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen" (The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude other from every influence). See [www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3642](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3642) (accessed on 18.07.2014) for an official translation of the German Civil Code (*BGB*).

<sup>96</sup> *BVerfGE* 58, 300 (1981) 332.

<sup>97</sup> *BVerfGE* 58, 300 (1981) 335.

the scope of the property right guarantee in the Basic Law cannot be determined on the basis of private law regulations.<sup>98</sup>

According to the Federal Constitutional Court, the Water Resources Act was not intended to expropriate property.<sup>99</sup> The Act constituted a regulation of property in the sense of defining the limits and content of property in relation to groundwater for purposes of article 14.1.2 of the Basic Law.<sup>100</sup> The Basic Law mandates the legislature to define property in a way that protects the interests of private property owners as well as the general public interest. However, the legislature may only limit property rights to the extent authorised by the Basic Law.<sup>101</sup> The fact that the Act removed a specific category of property (groundwater) from the sphere of private ownership does not necessarily conflict with the institutional property guarantee.<sup>102</sup> The Court held that the objections to the Act rest on the mistaken assumption that groundwater was legally inseparable from the right to property.<sup>103</sup> According to the Court, it was incorrect to assume that the commencement of the Act would lead to an erosion of the core of property rights because it would be subject to total control in the public interest.<sup>104</sup> A property owners' entitlement to use and dispose of his property was not lost because the right to use groundwater is made subject to state

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<sup>98</sup> BVerfGE 58, 300 (1981) 335.

<sup>99</sup> BVerfGE 58, 300 (1981) 337.

<sup>100</sup> BVerfGE 58, 300 (1981) 337-338.

<sup>101</sup> BVerfGE 58, 300 (1981) 338.

<sup>102</sup> BVerfGE 58, 300 (1981) 339. The Court held that "[d]ie Gewährleistung des Rechtsinstituts wird nicht angetastet, wenn für die Allgemeinheit lebensnotwendige Güter zur Sicherung überragender Gemeinwohlbelange und zur Abwehr von Gefahren nicht der Privatrechtsordnung, sondern einer öffentlich-rechtlichen Ordnung unterstellt werden" (the institutional guarantee is not infringed when public law intrudes to protect aspects of property vital to the well-being of the general public. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 259.

<sup>103</sup> BVerfGE 58, 300 (1981) 345.

<sup>104</sup> BVerfGE 58, 300 (1981) 345. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 260.

approval.<sup>105</sup> The Court emphasised that the constitutional right to property does not guarantee the most economically viable use of the property.<sup>106</sup> The Court considered the legal position of the plaintiff before and after the commencement of the Act. It held that the Act would have been incompatible with the Basic Law if it abruptly and without any transitional period abolished pre-existing rights to use groundwater.<sup>107</sup> Furthermore, the Court held that the Act was not unconstitutional because it denied the right to the continuous use of property (groundwater) without the payment of compensation.<sup>108</sup> The constitutional guarantee of property does not imply that a property entitlement must endure in perpetuity or that it can be taken away only by means of expropriation.<sup>109</sup> The Federal Constitutional Court has repeatedly emphasised that the legislature, in reforming a specific aspect of law, was not limited to the two alternatives of either preserving the previous legal position or paying compensation for changes to the existing order.<sup>110</sup> The legislature may, within the framework of article 14.1.2 of the Basic Law, alter or reform individual legal positions when such change is justified by the public interest, provided that it does not infringe on the individual property guarantee.<sup>111</sup> In this case the Court found that legislature provided adequate and reasonable transitional measures in the Act that afforded the plaintiff the possibility of continuing his unhindered use of groundwater without a permit for five years from the commencement of the Act.<sup>112</sup> The Court concluded that

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<sup>105</sup> BVerfGE 58, 300 (1981) 345.

<sup>106</sup> BVerfGE 58, 300 (1981) 345.

<sup>107</sup> BVerfGE 58, 300 (1981) 349.

<sup>108</sup> BVerfGE 58, 300 (1981) 350. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 261.

<sup>109</sup> BVerfGE 58, 300 (1981) 350-351. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 261.

<sup>110</sup> BVerfGE 58, 300 (1981) 351. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 261.

<sup>111</sup> BVerfGE 58, 300 (1981) 351.

<sup>112</sup> BVerfGE 58, 300 (1981) 351-352. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 261.



the Act did not infringe the individual property guarantee in article 14 of the Basic Law and did not give rise to a duty to pay compensation.<sup>113</sup>

In this case the Court created a categorical dichotomy between regulatory deprivation and expropriation of property. The Court put an end to the civil and administrative courts' respective approaches to the determination whether a regulatory interference constitutes deprivation or expropriation of property. In this regard, the Court emphasised the respective courts' jurisdiction. The Federal Constitutional Court criticised the practice that developed in the civil courts to award compensation for the regulatory interference that resulted from an administrative decision without challenging the validity of the administrative decision in the administrative courts.<sup>114</sup> The Court held that the civil courts jurisdiction is restricted to disputes regarding the amount of compensation payable on expropriation. The presence of a valid expropriation was therefore a pre-requisite. It was therefore no longer possible for the civil courts to award compensation to property owners who have been forced to bear a harsh and disproportionate burden that resulted from a regulatory deprivation of property in terms of 14.1.2 of the Basic Law. The appropriate route for the property owner in this case is to approach the administrative courts and challenge the validity of the administrative action that gives rise to the harsh and disproportionate burden. If the administrative action effected a harsh and disproportionate burden in the opinion of the administrative court, the regulatory measure must be invalidated. It cannot be upheld on the condition that compensation should be payable. Therefore, the Federal Constitutional Court explicitly rejected the notion of constructive expropriation which would allow the courts to transform

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<sup>113</sup> *BVerfGE 58, 300 (1981) 353.*

<sup>114</sup> *BJPG Roozendaal Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland (1998) 87.*

excessive regulatory measures into expropriation and require the payment of compensation.

### **2 3 3 The equalisation solution is accepted: The Denkmalschutz decision<sup>115</sup>**

The Federal Constitutional Court had to consider the compatibility of the Monument Protection Act of the Rhineland-Palatinate<sup>116</sup> (the Act) with article 14 of the Basic Law. The Act regulated the protection, restoration and maintenance of historic buildings and objects and required private owners of buildings protected by the Act to apply for prior state approval before any such building could be demolished or altered. The claimant in this case was the owner of a villa which was built during the *Grunderzeit*, a period during the nineteenth century that was known for the grandeur of its buildings.<sup>117</sup> The property (villa) was initially used as a residential house but became unsuitable for this use and has since 1981 been standing vacant.<sup>118</sup> In 1981 the claimant applied in terms of the Act to the relevant authority for permission to demolish the villa since she no longer had any economically viable use for the building. For years she had tried to find a meaningful alternative use for it, including attempts to lease the property. However, her efforts were unsuccessful. In addition, the claimant also offered free use of the villa to the local authority to utilise it as a museum, subject to the condition that it had to bear the maintenance costs of the

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<sup>115</sup> For a discussion of the case refer to J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 246-256; E Du Plessis "To what extent may the state regulate private property for environmental purposes? A comparative study" 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 512-526 at 523; H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 252-253; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 119-121.

<sup>116</sup> *Denkmalschutz- und Pflegegesetz – DSchPflG* 23.03.1978 (GVBl S 159).

<sup>117</sup> *BVerfGE* 100, 226 (1999) para 44. See also H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 252.

<sup>118</sup> *BVerfGE* 100, 226 (1999) para 45.

villa. This offer was turned down on the basis that the estimated maintenance costs exceeded 1 million *Deutsche Marks* (DM).<sup>119</sup> Furthermore, the claimant's annual maintenance costs were estimated at 300 000 DM. On the facts of the case it was clear that the claimant's efforts and monetary expenditure on the villa were disproportionate to her use and enjoyment of the villa.<sup>120</sup> However, despite this fact, the local authority nevertheless refused to grant the claimant permission to demolish the villa.<sup>121</sup> In 1983 the villa was placed under formal protection.<sup>122</sup> The claimant's subsequent appeals to the administrative courts against the local authority's decision to refuse her permission to demolish the villa were without success. The Higher Administrative Court (*Obergerverwaltungsgericht*) dismissed the claimant's appeal on the grounds that the relevant authority, in terms of the Act, only had to consider the historical value and nature of the building in deciding whether the building should be placed under formal protection. It held that other considerations such as the financial position of the private owner or the economic viability of the remaining uses for the property need not be taken into account.<sup>123</sup> With regard to the demolition order, the Court held that it was not in the public interest to demolish the villa.<sup>124</sup> § 13 of the Act which concerned demolition orders did not require the decision maker to consider the interests of property owners when deciding whether to grant or refuse a demolition order. Therefore, the Act did not make provision for the impact that refusal of a demolition order would have on the affected property owner, including for example the fact that the building would be rendered useless or impose an uneconomical burden on the owner with regard to the restoration and maintenance of the

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<sup>119</sup> *BVerfGE* 100, 226 (1999) para 46.

<sup>120</sup> *BVerfGE* 100, 226 (1999) para 46.

<sup>121</sup> *BVerfGE* 100, 226 (1999) para 47.

<sup>122</sup> *BVerfGE* 100, 226 (1999) para 48.

<sup>123</sup> *BVerfGE* 100, 226 (1999) para 49.

<sup>124</sup> *BVerfGE* 100, 226 (1999) para 50.

building.<sup>125</sup> The Court found the decision to place the claimant's building under formal protection and the decision to refuse the demolition order to be valid. Furthermore, the Court did not consider the financial burden on the claimant as extensive as was alleged, since it would be payable over a long period of time.<sup>126</sup>

On appeal, the Federal Constitutional Court considered whether § 13 of the Act was in accordance with article 14 of the Basic Law.<sup>127</sup> The claimant argued that § 13 of the Act infringed the property guarantee in article 14 of the Basic Law because the refusal of a demolition order constituted an *enteignender Eingriff*, the nature and extent of which required the payment of compensation but which the Act failed to provide.<sup>128</sup> The Federal Constitutional Court stated that the infringement that resulted from § 13 of the Act constituted a regulatory interference with property rights under article 14.1.2.<sup>129</sup> The Court held that the Act applied in abstract and generally by affecting all landowners' use rights in relation to monument buildings on their land. Therefore, § 13 of the Act did not constitute expropriation of property under article 14.3 of the Basic Law.<sup>130</sup> As a first step it was therefore held that the authorising statute does not deal with or authorise expropriation.

The next step is to assess the validity of the regulatory action undertaken in terms of the Act. The Court held that the legislature must, in its determination of the contents and limits of property rights under article 14.1.2 of the Basic Law, establish an equitable balance between the interests of the public and the interests of private

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<sup>125</sup> BVerfGE 100, 226 (1999) para 50.

<sup>126</sup> BVerfGE 100, 226 (1999) para 51.

<sup>127</sup> BVerfGE 100, 226 (1999) para 54.

<sup>128</sup> BVerfGE 100, 226 (1999) para 56.

<sup>129</sup> BVerfGE 100, 226 (1999) para 79.

<sup>130</sup> BVerfGE 100, 226 (1999) para 81.

property owners.<sup>131</sup> Furthermore, the legislature should uphold other constitutional principles underlying the property guarantee and may not limit property beyond the purpose for which the legislation was enacted.<sup>132</sup> Although the Basic Law authorises the legislature to determine the limits and contents of property rights, it simultaneously sets the limits to which the legislature may legitimately interfere with property rights. The Court confirmed the *Naßauskiesung* decision in which it held that regulatory interferences with property rights that exceed the limits set by the Basic Law are illegal and gives rise to a constitutional challenge of the validity of the legislation. This type of regulatory interference cannot be used as the basis to found a claim for compensation.<sup>133</sup>

With regard to the validity of § 13 of the Act, the Court held that the Act, in contrast to other similar legislation, did not consider the interests of private owners. Moreover, the burden that resulted from the refusal to grant a demolition order was, in certain situations, disproportionate.<sup>134</sup> The Court held that the protection of historic and culturally valuable buildings was in the public interest and generally could be justified under article 14.1.2 of the Basic Law.<sup>135</sup> Furthermore, the Court held that the consent-based procedure adopted in § 13 of the Act was a suitable and necessary method to protect these types of buildings.<sup>136</sup> The Court was of the opinion that there was no other equally effective and less invasive method available to fulfil the purpose sought to be achieved by the Act.<sup>137</sup> The Court stated that the burden imposed by the

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<sup>131</sup> BVerfGE 100, 226 (1999) para 83.

<sup>132</sup> BVerfGE 100, 226 (1999) para 83.

<sup>133</sup> BVerfGE 100, 226 (1999) paras 85, 103.

<sup>134</sup> BVerfGE 100, 226 (1999) para 87.

<sup>135</sup> BVerfGE 100, 226 (1999) para 88.

<sup>136</sup> BVerfGE 100, 226 (1999) para 89. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 250-251.

<sup>137</sup> BVerfGE 100, 226 (1999) para 89.

Act would in most cases not be disproportionate.<sup>138</sup> In light of the important social function fulfilled by historical and culturally valuable property, the Court emphasised that owners of such property must accept that their rights in relation to such property may legitimately be limited. Furthermore, article 14 of the Basic Law does not guarantee owners exploitation of the most beneficial use of their property.<sup>139</sup>

However, the situation was different when the owner no longer had any meaningful use of the protected building or his existing use of the property becomes impractical.<sup>140</sup> According to the Court, the burden that resulted from the legislation would be disproportionate if it deprived the owner of a historic building of all reasonable use of the property, including the possibility of selling the property.<sup>141</sup> The Court held that the refusal to grant a demolition order in these instances would not be reasonable.<sup>142</sup> In these circumstances, if the legislature was of the view that the public interest still required conservation of the particular building, the state would have to expropriate the property.<sup>143</sup> The Court found § 13 to be unconstitutional because it imposes a disproportionate burden on property owners and contained no measures that prevent the burden from being disproportionate.<sup>144</sup>

§ 31 of the Act contains a *salvatorische Klausel* (compensation clause) which allows compensation to be awarded in instances when the burden that results from

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<sup>138</sup> BVerfGE 100, 226 (1999) para 90. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 251.

<sup>139</sup> BVerfGE 100, 226 (1999) para 91.

<sup>140</sup> BVerfGE 100, 226 (1999) para 92.

<sup>141</sup> BVerfGE 100, 226 (1999) para 92. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 251.

<sup>142</sup> BVerfGE 100, 226 (1999) para 92.

<sup>143</sup> BVerfGE 100, 226 (1999) para 92. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 252.

<sup>144</sup> BVerfGE 100, 226 (1999) para 93.

the application of the Act is deemed excessive and expropriatory in nature.<sup>145</sup> However, the Court found that § 31 of the Act does not remedy the disproportionate burden that resulted from the refusal to grant the demolition order.<sup>146</sup> The Court recognised that the legislature could prevent the burden that results from a regulatory interference in terms of article 14.1.2 of the Basic Law from being disproportionate by providing for *Ausgleichsmaßnahmen* (equalisation measures).<sup>147</sup> However, the Court found that § 31 could not fulfil this function because the requirements and conditions that regulated the grounds for an entitlement to equalisation (*Ausgleich*) were too vague.<sup>148</sup> The legislature may, in principle, enforce regulatory measures that cause harsh and excessive interferences with property rights; provided that it is accompanied by equalisation measures that prevent the imposition of disproportionate and unequal burdens on property owners.<sup>149</sup> However, this would only in exceptional circumstances, be in accordance with article 14.1 of the Basic Law.<sup>150</sup> The Court stressed that equalisation measures were not a general permissible constitutional means to bring disproportionate regulatory limitations of property rights in accordance with article 14.1 of the Basic Law.<sup>151</sup> Regulatory measures that determine the content and limits of property rights must be in conformity with the constitutional protection of the core of property rights and the

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<sup>145</sup> BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 99 explains that *salvatorische Klauseln* provides compensation for loss of a certain magnitude that result from regulatory interferences with property. Roozendaal states that these *salvatorische Klauseln* are not compensation for expropriation although they bear some similarities. These *salvatorische Klauseln* are seen as a safety net to prevent the regulatory interference from being unconstitutional.

<sup>146</sup> BVerfGE 100, 226 (1999) para 94.

<sup>147</sup> BVerfGE 100, 226 (1999) para 94.

<sup>148</sup> BVerfGE 100, 226 (1999) para 94. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 253.

<sup>149</sup> BVerfGE 100, 226 (1999) para 96.

<sup>150</sup> BVerfGE 100, 226 (1999) para 95. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 253.

<sup>151</sup> BVerfGE 100, 226 (1999) para 97.



principle of equality, even in the absence of equalisation measures.<sup>152</sup> Equalisation measures can, in exceptional cases, where the application of the Act imposes an unreasonable burden on property owners, be utilised to ameliorate the disproportionate and unequal burden, but they cannot solve all problems with disproportionality.<sup>153</sup> The Court held that equalisation measures do not help when neither technical, administrative, nor financial measures provided for in the statute can bring the regulatory interference in line with the principle of proportionality.<sup>154</sup>

The Court held that equalisation measures should comply with the following requirements to be in accordance with article 14.1.2 of the Basic Law:<sup>155</sup> (a) Equalisation measures require a legal basis.<sup>156</sup> Consequently, a claim for compensation may only be considered if such monetary equalisation measure is specifically provided for in the relevant statute.<sup>157</sup> (b) The statutory inclusion of a general claim to monetary compensation for harsh and excessive regulatory interferences that may result from the application of the specific legislation does not constitute an appropriate equalisation measure. Such general compensation provision will not prevent the regulatory burden from offending against the proportionality principle.<sup>158</sup> The Court emphasised that the individual property guarantee in article 14.1 of the Basic Law requires the legislature to avoid imposing disproportionate burdens on property owners and preserve as far as possible the

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<sup>152</sup> BVerfGE 100, 226 (1999) para 97.

<sup>153</sup> BVerfGE 100, 226 (1999) para 97. BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 97 states that the courts are careful in their treatment of equalisation measures to prevent the view that the lawfulness of the excessive regulatory measure can be bought.

<sup>154</sup> BVerfGE 100, 226 (1999) para 98.

<sup>155</sup> BVerfGE 100, 226 (1999) para 99.

<sup>156</sup> BVerfGE 100, 226 (1999) para 100.

<sup>157</sup> BVerfGE 100, 226 (1999) para 100.

<sup>158</sup> BVerfGE 100, 226 (1999) para 101. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 254.

owners' beneficial use of the property.<sup>159</sup> The instruments available to the legislature in this regard include transitional measures, exception and exemption provisions as well as other administrative and technical measures. If such equalisation measures are not possible or only possible by means of disproportionate or unreasonable costs, financial equalisation measures may be considered or it may be necessary to allow the owner to force the state to expropriate the property at market value.<sup>160</sup> (c) The legislature, when determining the content and limits of property rights must also at the same time determine the nature and extent of possible and appropriate equalisation measures for otherwise disproportionate burdens and stipulate the grounds that would entitle a property owner to these equalisation measures.<sup>161</sup>

The Court held that the correct approach for a property owner whose property rights have disproportionately been infringed under article 14.1.1 of the Basic Law was to challenge the relevant administrative action in the administrative courts.<sup>162</sup> The Court emphasised that it was no longer possible for such regulatory measure to remain in force by awarding compensation to equalise the disproportionate burden under article 14.1.2 of the Basic Law.<sup>163</sup> The legislature can attach substantive equalisation measures to supplement procedural administrative provisions and thereby ensure that, if appropriate and necessary, the extent of the infringement of a property right or the burden on the individual property owner that results from the administrative action be equalised.<sup>164</sup> Furthermore, the Court held that when the equalisation measure comprises of monetary compensation, the statute should at

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<sup>159</sup> BVerfGE 100, 226 (1999) para 101. See also J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 254-255.

<sup>160</sup> BVerfGE 100, 226 (1999) para 101.

<sup>161</sup> BVerfGE 100, 226 (1999) para 102.

<sup>162</sup> BVerfGE 100, 226 (1999) para 103.

<sup>163</sup> BVerfGE 100, 226 (1999) para 103.

<sup>164</sup> BVerfGE 100, 226 (1999) para 104.

least set out the grounds that would entitle a property owner to a claim for compensation.<sup>165</sup> The Court concluded that § 31 of the Act did not satisfy these requirements.<sup>166</sup> Solely on the basis of the absence of exception or exclusion measures or any other administrative or technical measures, § 31 constituted an inappropriate equalisation measure to ameliorate the disproportionate burden that resulted from the refusal to grant a demolition order under § 13 of the Act.<sup>167</sup>

The Court nevertheless held that the incompatibility of § 13 of the Act with article 14.1 of the Basic Law did not result in the invalidity of the provision.<sup>168</sup> Such legal consequence could be avoided if the legislature provides for equalisation measures in the statute that would prevent the burden from being disproportionate and consequently unconstitutional.<sup>169</sup> The Court did not consider invalidating § 13 of the Act to be appropriate. Invalidating the Act would have created a *lacuna* in the area pertaining to the protection of historic buildings and monuments. The Court stated that the demolition of historic and culturally valuable buildings would always require state approval.<sup>170</sup> Furthermore, the relevant authority must use its discretion and take the interests of the affected property owner into account when deciding whether to grant the demolition order.<sup>171</sup> The refusal of a demolition order would be unconstitutional in cases where the preservation of the protected building would impose an unreasonable burden on the property owner.<sup>172</sup> However, such a result would thwart the legislature's intention to protect historic and culturally valuable

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<sup>165</sup> BVerfGE 100, 226 (1999) para 104.

<sup>166</sup> BVerfGE 100, 226 (1999) para 105.

<sup>167</sup> BVerfGE 100, 226 (1999) para 105.

<sup>168</sup> BVerfGE 100, 226 (1999) para 106.

<sup>169</sup> BVerfGE 100, 226 (1999) para 106.

<sup>170</sup> BVerfGE 100, 226 (1999) para 107.

<sup>171</sup> BVerfGE 100, 226 (1999) para 107.

<sup>172</sup> BVerfGE 100, 226 (1999) para 107.

buildings in the public interest.<sup>173</sup> The Court held that the legislature's intention can be realised in a constitutionally valid manner. As a result, the Court suspended the invalidity of § 13 of the Act to give the legislature the opportunity to revise the Act and insert equalisation measures that appropriately equalise the disproportionate burden on individual property owners in certain instances.

With regard to determining whether an interference with property rights constitutes a regulatory deprivation or expropriation, the Federal Constitutional Court in this case went further than it did in *Naßauskiesung* and also considered whether equalisation measures can remedy excessive regulation. The Court considered the various types of equalisation measures and set out the requirements thereof. The Court held that other (lesser) equalisation measures, for example transitional arrangements and regulatory exceptions, should first be exhausted before reverting to financial equalisation.<sup>174</sup> Kischel states that an equalisation obligation (*Ausgleichspflicht*) does not only, or primarily, mean financial equalisation payments.<sup>175</sup> Non-financial measures are not only possible but also have precedence over financial equalisation payments. However, they are still equalisation measures that serve the same purpose, namely to prevent the harsh burden that may result from the application of regulatory laws from being disproportionate under article 14.1.2 of the Basic Law.

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<sup>173</sup> BVerfGE 100, 226 (1999) para 107.

<sup>174</sup> BVerfGE 100, 226 (1999) para 96. See also H Mostert "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 at 254. For a discussion on different equalisation measures see U Kischel "Wann ist die Inhaltsbestimmung ausgleichspflichtig?" (2003) 58 *JuristenZeitung* 604-613 at 605.

<sup>175</sup> U Kischel "Wann ist die Inhaltsbestimmung ausgleichspflichtig?" (2003) 58 *JuristenZeitung* 604-613 at 607.

Importantly, the Court stated that “*kompensatorische Entschädigungsansprüche ... sollen ... nur durch ein Gesetz geschehen*”<sup>176</sup> (a claim for compensatory equalisation is only possible if it is provided for in the statute), which unambiguously removed the existing uncertainty about the question whether equalisation measures had to be expressly provided for in the infringing legislation.<sup>177</sup> Van der Walt states that the possible harm that may result from the regulatory state action must be foreseeable and the authorising statutory framework should provide an appropriate equalisation measures to reduce the burden.<sup>178</sup> Legislation may therefore not include a blanket provision to cover all unforeseen circumstances where the regulatory action has unexpected harsh effects for an individual property owner.<sup>179</sup> Therefore, a prerequisite for an equalisation measure is a clause (*Entschädigungsklausel*) in the regulatory statute that explicitly and clearly regulates the nature and extent of the appropriate equalisation measures and specifies the grounds when a claim for equalisation may arise and awards the relevant agency the discretion to make equalisation payments.<sup>180</sup>

## 2 4 Concluding remarks

The notion of something similar to constructive expropriation was considered in German law by the civil, administrative and constitutional courts. The civil and

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<sup>176</sup> BVerfGE 100, 226 (1999) para 100.

<sup>177</sup> AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 143-144. See also GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 120.

<sup>178</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 276.

<sup>179</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 276.

<sup>180</sup> F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 326-327. See also MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 210; GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 120.

administrative courts developed and applied two different methods to transform excessive regulatory measures into expropriation and require the payment of compensation. However, the Federal Constitutional Court considered the civil and administrative courts' respective approaches and found that neither of the two courts had jurisdiction to consider whether excessive regulatory measures constitute expropriation. Furthermore, the Court held that the judicial requirement of compensation for excessive regulatory measures was in conflict with the Basic Law, especially article 14.3 which sets out the requirements for valid deprivation. Therefore, in *Naßauskiesung* the Federal Constitutional Court explicitly rejected the possibility of recognising any solution like constructive expropriation. Moreover, in *Naßauskiesung*<sup>181</sup> the Federal Constitutional Court made it clear that the type of excessive regulatory measures discussed in chapter 1 are invalid and cannot form the basis for a claim for compensation.

The question whether the provision of non-expropriatory compensation could equalise the excessiveness of the burden and thereby prevent the regulatory measure from being disproportionate and consequently invalid was raised in *Naßauskiesung* but expressly considered in *Denkmalschutz*.<sup>182</sup> In *Denkmalschutz* the Federal Constitutional Court made it clear that excessive regulatory measures may be upheld if the legislature explicitly provides for equalisation measures in the specific regulatory statute.<sup>183</sup> However, equalisation measures are only allowed in exceptional circumstances and must be sufficient and appropriate in preventing the excessive regulatory burden from being disproportionate. Non-monetary equalisation measures take precedence over monetary equalisation. Furthermore, the equalisation measures must be clear and detailed since a vague, catch-all provision

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<sup>181</sup> BVerfGE 58, 300 (1981).

<sup>182</sup> BVerfGE 100, 226 (1999).

<sup>183</sup> F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 326-327.

will not be seen as a valid equalisation measure. Therefore, in the absence of such specific statutory provision for compensatory equalisation, the affected property owner cannot claim compensation and if it is found to be excessive the regulatory limitation will be declared invalid.<sup>184</sup>

### 3 The *égalité* principle in Dutch and Belgian law

#### 3.1 Introduction

The equality before public burdens principle (*égalité* principle) originated in French administrative law, which in turn influenced Dutch and Belgian law. The French *égalité* principle also had an influence on German law,<sup>185</sup> particularly in the German civil and administrative jurisprudence prior to the *Naßauskiesung* decision. According to Ossenbühl and Cornils, the claim to compensation against a public authority for the infringement of property rights of the individual through the exercise of administrative powers (*Aufopferungsanspruch*) is rooted in natural law in terms of the *Prinzip der Lastengleichheit* (principle of equal burdens).<sup>186</sup>

The *égalité* principle is a judicial instrument developed to apply in situations where a lawful regulatory state action results in an unequal and disproportionate burden being imposed on an individual or a small group of property owners. Different

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<sup>184</sup> F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 327.

<sup>185</sup> AJ van der Walt “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 *South African Public Law* 273-331 at 290 points out that the equalisation payments that developed in German law differ from the administrative-law compensation in French law. AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 275 elaborates on the distinction by stating that compensation on the basis of the equality principle is required for direct, clear and serious loss resulting from the installation or maintenance of public works. This is not the case with equalisation payments in German law. See also MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 204.

<sup>186</sup> F Ossenbühl & M Cornils *Staatshaftungsrecht* (6<sup>th</sup> ed 2013) 125.



criteria are applied to determine whether the *égalité* principle is applicable and whether the loss resulting from a regulatory measure should be compensated. This section discusses the development of the *égalité* principle in French, Dutch and Belgian law briefly and highlights its application in the respective jurisdictions.

### 3.2 *Origin of the égalité principle in French administrative law*

No-fault liability is essentially judge-made law.<sup>187</sup> Errera states that no-fault liability is the exception to the prevailing fault-based liability rule in French law.<sup>188</sup> The notion of no-fault liability is a judicial answer to situations in which the classical rules could not apply without creating substantial inequality and unfairness.<sup>189</sup> However, the *égalité* principle is not clear-cut or without shortcomings.<sup>190</sup>

The French Administrative Court (*Conseil d'État*) is the supreme and final instance regarding the validity of administrative acts.<sup>191</sup> Initially, the state could only be held liable for damage that resulted from unlawful state action (*responsabilité pour faute*) but later developments expanded the scope of state liability to include

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<sup>187</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 172.

<sup>188</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 173.

<sup>189</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 173. See also MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 110.

<sup>190</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 173 questions whether the *égalité* principle is an adequate judicial instrument, in particular in reviewing economic decisions of the state. Furthermore, the courts' reasoning are not always clear and complete and are often muddled with useless complexities. Errera points out that some reorganisation is needed, but argues that it is primarily the task of Parliament, with the assistance of the courts and the executive.

<sup>191</sup> LN Brown & JS Bell *French administrative law* (5<sup>th</sup> ed 1998) 44 states that the *Conseil d'État* is the Supreme Administrative Court.

damages that arise from lawful state action (*responsabilité sans faute*).<sup>192</sup> Two fundamental principles, namely “balance of the contract” (*responsabilité pour risque*) (also referred to as the risk principle) and “equality before public burdens” (*égalité devant les charges publiques*, hereafter the *égalité* principle) played an important role in the development of state liability for lawful state actions.<sup>193</sup> Of particular importance is the second principle, the *égalité* principle. The *égalité* principle is primarily applicable to loss that results from legal instruments such as administrative decisions, regulations and legislation.<sup>194</sup> The principle also applies to loss that results from state actions that are factual in nature, for example where loss is caused by public works (*travaux et ouvrages publics*).<sup>195</sup> The origin of this principle dates back to the French Revolution.<sup>196</sup> The *égalité* principle is entrenched, albeit not in express terms, in article 13 of the Declaration of the Rights of Man and the Citizen 1789 (*Déclaration des Droits de l’Homme et du Citoyen*).<sup>197</sup> The *égalité* principle underscores the fact that public burdens should be evenly distributed amongst those

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<sup>192</sup> GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 169. R Errera “The scope and meaning of no-fault liability in French administrative law” (1986) 39 *Current Legal Problems* 157-180 at 173 emphasises that no-fault liability is the exception to the rule that the state can only be held liable once fault has been established.

<sup>193</sup> GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 169. See MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 193-195 for a discussion on the distinction between these two foundations for state liability. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 524; MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 116.

<sup>194</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 932, 966.

<sup>195</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 932, 966. For example where an owner of a commercial premises loses income due to the state’s undertaking in building a road resulted in restricting or hindering public access to the owner’s premises.

<sup>196</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 36.

<sup>197</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 38, 136. See also GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 170; BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 153; W Konijnenbelt “De egalite devant les charges publiques in het Franse administratieve recht” (1971) 5 *Bestuurswetenschappen* 263-298 at 267.

affected by it, including property owners.<sup>198</sup> If one person, in comparison with another similarly situated person, has to bear a disproportionately heavy burden for the benefit of the public as a whole the state has a duty to pay compensation.<sup>199</sup>

It was only after the French Administrative Court declared the *égalité* principle a constitutional principle that it started functioning as an autonomous, direct basis of state liability.<sup>200</sup> The *Couitéas*<sup>201</sup> decision is seen as the origin of the jurisprudence on the *égalité* principle.<sup>202</sup> In the *Couitéas* decision, the French Administrative Court not only developed the doctrine of no-fault state liability for lawful state action but also

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<sup>198</sup> GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 170. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 275. MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 2 states that the *égalité* principle requires that “de lasten die het gevolg zijn van overheidshandelen in het algemeen belang, niet ten laste van een toevallige burgen komen, maar door de gemeenschap worden gedragen” (burdens that result from state action in the public interest should not rest on one individual but should be borne by the public as a whole).

<sup>199</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 3. AJ van der Walt “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 *South African Public Law* 273-331 at 298-299 explains that the compensation claim is based upon administrative law and not the constitutional property clause or on private property law.

<sup>200</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 42. See also R Errera “The scope and meaning of no-fault liability in French administrative law” (1986) 39 *Current Legal Problems* 157-180 at 172; MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 118.

<sup>201</sup> CE 30 November 1923 *Recueil des décisions du Conseil d'Etat* 789 (*Couitéas*). In this case a private owner's property was unlawfully occupied by approximately 8 000 Tunisian rebels. A French court granted an eviction order, and ordered military assistance, should it have been necessary, to effect the eviction order. In terms of French law the administration may, on grounds of public order or of security, refuse its help. However, if the refusal continues for a certain period, the state must compensate the burdened property holder. The French Minister feared military assistance would cause public upheaval and therefore refused to execute the eviction order. Although the *Conseil d'Etat* found that the administrative decision not to comply with the court order was lawful, it awarded compensation to the property owner who could not make any use of his property for the entire period of unlawful occupation. For a summary and discussion of the decision, see MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 150-153. See also the summary of the decision in R Errera “The scope and meaning of no-fault liability in French administrative law” (1986) 39 *Current Legal Problems* 157-180 at 157; MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 111.

<sup>202</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 193. BJPG Roozendaal *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 153 points out that the *Conseil d'Etat* applied the *égalité* principle without ever using the term. The *Conseil d'Etat* expressly mentioned the term for the first time in the CE 2 June 1944 *Recueil des décisions du Conseil d'Etat* 159 (*Fays*) decision.

developed the criteria to determine when liability could exist.<sup>203</sup> The *égalité* principle is breached when an individual or a limited group of property owners suffer a loss, caused by otherwise lawful state action, that is not suffered by other similarly situated owners (*spécialité*),<sup>204</sup> provided that the loss is abnormal (*anormalité*).<sup>205</sup> If both these principles are complied with, the state must compensate the affected property owners.<sup>206</sup>

In *La Fleurette*,<sup>207</sup> the *Conseil d'État* extended the scope of the *égalité* principle to state liability arising from formal legislation.<sup>208</sup> Errera states that liability arising

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<sup>203</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 46.

<sup>204</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 162 points out that the *spécialité* requirement does not only require the unequal distribution of burdens but also that the affected persons suffer a loss for the exclusive benefit of others. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967.

<sup>205</sup> GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 170. See also Roozendaal B JPG *Overheidsaansprakelijkheid in Duitsland, Frankrijk en Nederland* (1998) 154-157; R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 161; W Konijnenbelt "De egalite devant les charges publiques in het Franse administratieve recht" (1971) 5 *Bestuurswetenschappen* 263-298 at 284. AJ van der Walt "Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings" (1999) 14 *South African Public Law* 273-331 at 296 states that a regulatory interference is regarded as abnormal when "it deprives the property holder of the right itself or of all enjoyment of the right, or undermines the meaning of the right, or empties the right of all its content, or when it affects not only the property but also the persons occupying the property, in a significant manner, thereby threatening their right to liberty as well as their property".

<sup>206</sup> GE van Maanen & R de Lange *Onrechtmatige overheidsdaad* (4<sup>th</sup> ed 2005) 170 mention that it is difficult in practice to comply with these two requirements. See also MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 119.

<sup>207</sup> CE 14 January 1938 *Recueil des décisions du Conseil d'Etat* 25 (*La Fleurette*). In this case, a statutory ban was imposed on the production and sale of a product resembling cream for purposes of protecting the dairy industry. *La Fleurette* specialised in, and was the sole producer of the product, claimed compensation for the loss it suffered from the cessation of its enterprise. The *Conseil d'Etat* found that the motive behind the legislative prohibition was not to protect the public health and safety, since no harm could be established, but was a purely economic decision to protect the dairy industry from dairy-substitute products in a period of recession. The *Conseil d'Etat* held that although the legislation made no provision for compensation, there was nothing in the statute that indicated that the legislature had intended that the plaintiff should bear the loss. Although the Court never explicitly mentioned the *égalité* principle, it concluded that the loss is a loss that should be borne by society as a whole. See the summary and discussion of this decision in MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 154-157. See also the summary of the decision in R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 158.

<sup>208</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 154.

from statute has had a restricted development.<sup>209</sup> The *Conseil d'État* has since *La Fleurette* become more reserved.<sup>210</sup> If the legislature explicitly excludes compensation, or limits it to a fixed amount, or restricts it to certain specified instances, the courts cannot go further than what the statute provides for.<sup>211</sup> However, when the legislature does not say anything about compensation, the courts try to establish the intention of the legislature.<sup>212</sup> According to Tjepkema, the public interest served by the legislation guides the *Conseil d'État* in establishing the intention of the legislature.<sup>213</sup> A distinction is drawn between three instances. Firstly, no right to compensation exists if legislation prohibits a specific activity that is harmful to the public or morally unworthy of legal protection.<sup>214</sup> Secondly, the courts adopt a more deferential approach with regard to recognising a duty to compensate in instances where the legislature not only foresees the burden but also envisages that the burden should be unequally distributed.<sup>215</sup> This is especially the case where legislation is enacted for the advancement of economic policy adopted by the state, the achievement of which would be greatly impeded if an equal distribution of

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<sup>209</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 158. MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 155 points out that since the *La Fleurette* decision, the *Conseil d'Etat* has only recognised state liability arising from statute in three cases.

<sup>210</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 156.

<sup>211</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 159-160.

<sup>212</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 156.

<sup>213</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 157.

<sup>214</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 157-158. See also R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 160. The position is similar in US law. See for example *Mugler v Kansas* 123 US 623 (1887) paras 668-669 in which the Supreme Court held that "[a] prohibition upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit [which would, in both instances, require compensation]."

<sup>215</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 158-161.



burdens would lead to a duty to compensate. However, the unequal distribution of the regulatory burden should be necessary and should be in direct relation to achieving the public purpose.<sup>216</sup> Thirdly, no right to compensation exists where the legislation is aimed at serving a specific, general public interest.<sup>217</sup> However, Errera criticises the Courts' approach in using the purpose of the statute as justification for the decision not to award compensation.<sup>218</sup>

Tjepkema argues that there has been a shift in the *Conseil d'État*'s approach to state liability arising from formal legislation since 2003.<sup>219</sup> In terms of the new approach, the intention of the legislature still plays a role but it is no longer a determinative factor in instances where the legislature remains silent on the matter of compensation. The *Conseil d'État* now primarily focuses on the *spécialité* and *anormalité* requirements of the loss, regardless of the public purpose sought to be achieved by the specific legislation.<sup>220</sup> If the legislature wishes to exclude compensation it has to do so explicitly in the relevant legislation.

The *égalité* principle applies to those situations where the regulatory burden complained of in a specific case, is an inherent and necessary consequence of a regulatory state action that is performed in the public interest.<sup>221</sup> Although the regulatory limitation of an owner's property rights is the consequence of a conscious choice for a specific measure to fulfil the public purpose, the disproportionate effects

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<sup>216</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 160.

<sup>217</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 162-164.

<sup>218</sup> R Errera "The scope and meaning of no-fault liability in French administrative law" (1986) 39 *Current Legal Problems* 157-180 at 160-161.

<sup>219</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 165.

<sup>220</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 168.

<sup>221</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967.

of such measure are not always known beforehand.<sup>222</sup> However, the supervening loss itself is almost always a logical and foreseeable consequence of regulatory state actions.<sup>223</sup> Moreover, despite the foreseeability of the regulatory burden, the regulatory state action is necessary and important and has to be taken.<sup>224</sup> It is in these instances where the court may award compensation to the adversely affected property owner(s) in terms of the *égalité* principle if the regulatory burden complies with the requirements of *spécialité* and *anormalité*. Compensation cannot be awarded for every regulatory burden that results from lawful state actions. Therefore, the *spécialité* and *anormalité* requirements function as limits to this type of liability.<sup>225</sup> A burden fulfils the *spécialité* requirement if it only applies to an individual property owner or a small group of property owners and not to other similarly situated owners. Burdens that are imposed on the whole community or group of a certain size are, in principle, not in breach of the *égalité* principle.<sup>226</sup> Furthermore, a burden fulfils the *anormalité* requirement if it effects an excessive limitation of an owner's property rights and is disproportionate to the purpose sought to be achieved by the relevant legislation. Burdens that are classified as an accepted risk, or belong to the normal business risks, or fall under the normal social risks borne by everyone, do not give rise to a duty to pay compensation.<sup>227</sup>

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<sup>222</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967.

<sup>223</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967.

<sup>224</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967.

<sup>225</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967.

<sup>226</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 360-361, 967. The *égalité* principle only applies when one subgroup of the bigger group, who all share a specific characteristic, suffer a disproportionate burden.

<sup>227</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 967-968.



Unlike German law, the legislature need not specifically provide for compensation before a claim to compensation can be established. On the contrary, if the legislature wishes to exclude legislation in a specific instance it would have to provide this explicitly in the specific statute. The payment of compensation in terms of the *égalité* principle is not compensation for expropriation. Rather, it fulfils the same function as equalisation measures in German law in the sense that it evens out the disproportionate and excessive burden that result from an excessive regulatory measure.

### 3.3 *Nadeelcompensatie in Dutch law*

French law played a significant role in the development of Dutch administrative law in general, especially in the development of liability for lawful state action in terms of the *égalité* principle.<sup>228</sup> The *égalité* principle was only introduced in Dutch law in the 1930s, after the *La Fleurette* decision of the French *Conseil d'Etat*.<sup>229</sup> In Dutch law various courts have jurisdiction to determine whether compensation for a lawful state action is payable in a specific case. In this regard, Dutch law differs from French law. In French law only one institution, namely the *Conseil d'Etat* has jurisdiction to decide

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<sup>228</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 11. See also EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 459.

<sup>229</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 477. See the discussion of the *La Fleurette* decision above. MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 202. However, MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 961 points out that there were already in the late 1920s references to the *égalité* principle in Dutch literature and therefore indicates that the French jurisprudence in the CE 30 November 1923 *Recueil des décisions du Conseil d'Etat* 789 (*Couitéas*) decision did not go unnoticed in Dutch law.

this issue.<sup>230</sup> Therefore, the question whether compensation for lawful state action is payable developed differently in the two jurisdictions.<sup>231</sup>

In both Dutch and French law, a right to compensation for lawful state action can exist in instances where compensation is specifically provided for in the relevant statute, but also in the absence of such a statutory compensation provision.<sup>232</sup> However, the relationship between a right to compensation for lawful state action and compensation in terms of an explicit statutory provision for compensation and the relationship between a right to compensation and an award for compensation without a specific statutory basis are not the same in the two jurisdictions.<sup>233</sup> Van Casteren describes the attitude of the French legislature as more amenable and states that it was the French judges who did the breakthrough work in no-fault state liability.<sup>234</sup> Conversely, the Dutch legislature is more cautious of judicial activism and has single-handedly, without judicial interference, introduced compensatory initiatives, especially in the areas of building and spatial planning laws.<sup>235</sup> However, this did not preclude the development of compensation for lawful state action outside the

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<sup>230</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 202.

<sup>231</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 202.

<sup>232</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 203. See also BJ Schueler "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE van Maanen; BPM van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 95; MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 959.

<sup>233</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 203.

<sup>234</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 203.

<sup>235</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 203. Van Casteren points out that the German legislature's initiatives are generally shaped by judicial perspectives. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 961-962.

statutory regulatory context.<sup>236</sup> Both French and Dutch law refer to the *égalité* principle as the basis upon which a claim for compensation for lawful state action is founded.<sup>237</sup> This principle is entrenched as the basis for such compensation in French law. However, in Dutch law, the judiciary has left the debate regarding the foundation of such claim mostly to the academic literature.<sup>238</sup> Although there is no consensus in Dutch law on the principle(s) that govern *nadeelcompensatie*, it is generally accepted that the *égalité* principle plays an important role.<sup>239</sup> However, the scope and application of the *égalité* principle remains unclear in Dutch law.<sup>240</sup>

In Dutch law, the point of departure is that there is no general right to compensation for lawful state action. Initially, a right to compensation only existed if it was explicitly provided for in the legislation or if the particular state action that brought about the loss was unlawful.<sup>241</sup> However, courts found that it was, in some situations, untenable and unfair to expect an individual to bear the burden that results

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<sup>236</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 203.

<sup>237</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 204.

<sup>238</sup> MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 204.

<sup>239</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 497. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 197, 931; BJ Schueler "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 95.

<sup>240</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 197, 931. BJ Schueler "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 95 also emphasises the uncertainty regarding the extent of the duty to pay *nadeelcompensatie*.

<sup>241</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 501; MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 25, 70; BJ Schueler "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 97; BPM van Ravels "Nadeelcompensatie en andere vergoedingen in die waterstaatszorg" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 261-423 at 263.

from a lawful state action without compensation.<sup>242</sup> Therefore, under the influence of French law, Dutch courts developed and applied the notion of *nadeelcompensatie* (compensation for no-fault state liability).<sup>243</sup> However, the judicial foundation for the application of *nadeelcompensatie* was uncertain and various alternatives were suggested in legislation, case law and in the academic literature.<sup>244</sup>

Initially, a right to *nadeelcompensatie* only existed when property had been expropriated.<sup>245</sup> No right to *nadeelcompensatie* existed for any other lawful interferences with property. As a result, expropriation was defined widely to enable more types of interferences with property to be characterised as expropriation.<sup>246</sup> It was only later that a distinction was drawn between expropriation, which requires full compensation, and other forms of lawful regulatory interference with property rights which could not be classified as expropriation but that nevertheless, in certain circumstances, required compensation.<sup>247</sup> The latter type of compensation was

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<sup>242</sup> BJ Schueler “Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het - bestuursrecht” in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 99.

<sup>243</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 961.

<sup>244</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 499. The discussion on *nadeelcompensatie* in Dutch law will primarily be focused on the *égalité* principle and the other legal foundations for *nadeelcompensatie* will only briefly be mentioned in the extent that they relate to the *égalité* principle.

<sup>245</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 100.

<sup>246</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 455. MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 206 states that although expropriation is, as a point of departure, a lawful state action which requires compensation, expropriation does not fall within the ambit of the doctrine of compensation for lawful state action. French law follows an independent procedure for expropriation and compensation for expropriation is dealt with differently than compensation in terms of no-fault state liability. To a lesser extent, this is also the position in Dutch law. Van Casteren states that the expropriation laws find their foundation in article 14 of the Dutch Constitution (*Grondwet voor het Koninkrijk der Nederlanden van 24 Augustus 1815*).

<sup>247</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 456.

based on some form of fairness consideration.<sup>248</sup> However, fairness was often determined on the basis of elements that make up the *égalité* principle.<sup>249</sup>

De Jongh did a historical analysis of the legal foundations for *nadeelcompensatie* in legislation, case law and literature from the period between 1815 until 2011 and concludes that the *égalité* principle forms the unwritten legal basis for *nadeelcompensatie*.<sup>250</sup> Moreover, she argues that this was the case even before it was explicitly recognised as a principle on which a direct right to *nadeelcompensatie* could be based.<sup>251</sup> A private law approach was adopted in the literature and by the judiciary to find a legal basis for *nadeelcompensatie* during the period 1940 up to 1982. In terms of this approach, *nadeelcompensatie* was founded on a creative interpretation of the *Burgerlijk Wetboek (BW)*, which only recognises compensation for unlawful state actions.<sup>252</sup> This led to the distortion of otherwise lawful but excessive regulatory measures into unlawful state actions which would then allow the courts to grant compensation. Even though a public law approach, in terms of which compensation could be claimed for lawful state action, gained

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<sup>248</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 456. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 21; JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 233.

<sup>249</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 458.

<sup>250</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 502. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 1-127 for a similar historical analysis of the reception and development of the *égalité* principle in Dutch law.

<sup>251</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 502.

<sup>252</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 461. See also MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 207; MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 961.

influence during this period it was only in the period after 1982 that the legal grounds for *nadeelcompensatie* in this respect crystallised.<sup>253</sup>

With regard to legislation, various statutes have since the beginning of the 1960s provided for a right to *nadeelcompensatie*, including for example the Forestry Act of 1961 (*Boswet*), Monuments Act of 1961 (*Monumentenwet*) and the Act on Spatial Planning of 1965 (*Wet op de Ruimtelijke Ordening*).<sup>254</sup> Tjepkema states that the parliamentary debate surrounding the adoption of these statutory compensation provisions for no-fault state liability was based on a “reasonableness formula”.<sup>255</sup> In terms of this reasonableness formula the question whether a right to compensation existed depended on whether the loss that would result from the statute fell within the “normal risks having to be borne by everyone in society” or constituted an “abnormal” and “disproportionate” burden.<sup>256</sup> In view of this approach, Tjepkema argues that an explicit recognition of the *égalité* principle did not seem necessary. Dutch law thereby implicitly adopted a solution that strongly resembled the one applicable in French law.<sup>257</sup> A right to *nadeelcompensatie* outside the statutory framework was only recognised for the first time in the 20<sup>th</sup> century, particularly at the end of the 1960s and the early 1970s.<sup>258</sup>

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<sup>253</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 462.

<sup>254</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 459. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 963.

<sup>255</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 963.

<sup>256</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 963.

<sup>257</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 963.

<sup>258</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 457, 461. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 963; BPM van Ravels “De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning” in PFA Bierbooms; H Pasman & GMF Snijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 73.



According to Tjepkema, one reason for the uncertainty regarding the content and scope of the *égalité* principle is the different approaches adopted by the *Hoge Raad* (Dutch Supreme Court) and the *Raad van State* (Dutch Administrative Court), respectively, in the criteria used to determine the applicability and scope of the *égalité* principle.<sup>259</sup> Both the *Raad van State* and the *Hoge Raad* (although less explicitly than the *Raad van State*) refer to the *égalité* principle as the only ground for *nadeelcompensatie*.<sup>260</sup> At the beginning of the 1970s a new system of administrative compensation (*bestuurscompensatie*) in regard to administrative decisions in the Ministry of Transport, Public Works and Water Management (*Verkeer en Waterstaat*) developed in the *Raad van State*.<sup>261</sup> In terms of this development, the state was obliged to take into account the possible adverse impact on rights and interests affected before making a lawful decision.<sup>262</sup> Tjepkema emphasises that although this development could not be seen as an application of the *égalité* principle,<sup>263</sup> it led to the creation of a new rule in the *Paul Krugerbrug* cases<sup>264</sup> whereby a right to

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<sup>259</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 5.

<sup>260</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 462. See also BPM van Ravels "De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning" in PFA Bierbooms; H Pasman & GMF Snijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 73.

<sup>261</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 104-105, 963.

<sup>262</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 963.

<sup>263</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 106 states that *bestuurscompensatie* was not always monetary compensation.

<sup>264</sup> ARRVs 12 January 1982, AB 1982, 299 (*Paul Krugerbrug I*); ARRVs 22 November 1983, AB 1984, 154 (*Paul Krugerbrug II*). See MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 107-109 for a summary and discussion of the decision. The facts of the case were that the Ministry of Transport, Public Works and Water Management (*Verkeer en Waterstaat*) decided to grant the city of Utrecht permission to build a bridge over a specific channel. However, a shipyard (De Liesbosch) located on the channel suffered a loss due to the fact that ships of a certain width (12-14 metres), which accounted for half the income of the shipyard, could not get access to that shipyard. The question in the first case was whether there was sufficient consideration of the shipyard's rights and interests before the decision was taken to grant the permission. The decision to grant permission was subject to the condition that the city had to take reasonable measures that would prevent third parties from suffering losses. In this case there was no consideration of the extent of the shipyard's loss or the amount of compensation



compensation flowed from the obligation to establish a just and equitable balance of interests *prior* to the taking of the administrative decision.<sup>265</sup> This prior balancing is needed to fulfil the proportionality principle, which would be breached and render the regulatory measure susceptible to invalidation if the public authority did not do a proper balancing of the rights and interests that are infringed by a lawful state interference, either by not granting, or granting insufficient compensation.<sup>266</sup> The obligation to carefully analyse, before the decision is taken, the adverse consequences that would follow from a lawful decision was often impractical since it is not always a guaranteed certainty that the loss will actually occur and it was often difficult to determine to what extent this loss should be compensated.<sup>267</sup>

Even though the *Raad van State* never mentioned the *égalité* principle, the conditions which had to be fulfilled to hold the state liable strongly resembled the criteria linked to the *égalité* principle.<sup>268</sup> Providing compensation for the disproportionate burden that may result from the exercise of an administrative decision (in the sense of the *égalité* principle) will ensure that such a decision is in accordance with the *evenredigheidsbeginsel* (proportionality principle) in article 3:4 paragraph 4 of the *Algemene wet bestuursrecht* of 4 June 1992 (*Awb*) (General

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the shipyard would be entitled to. The absence of this led the *Raad van State* to conclude that the decision to grant permission to build the bridge was in conflict with the non-arbitrariness requirement. The *Raad van State* held that the shipyard had to be informed, prior to taking the decision to grant the permission, how the amount of compensation will be determined and under what conditions one would be entitled to compensation. In the second case, the question was whether the amount of compensation payable to the shipyard as determined by the Minister was sufficient.

<sup>265</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 106, 963-964. The primary purpose in terms of the system of *bestuurscompensatie* was not to determine the conditions when the state will be liable but rather to determine the requirements for a proper balancing of interests.

<sup>266</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 107, 964.

<sup>267</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 964.

<sup>268</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 964.

Administrative Law Act, hereafter GALA).<sup>269</sup> Although it is accepted in the literature that the *égalité* principle is the sole independent ground for *nadeelcompensatie*, this view was challenged in the beginning of the 21<sup>st</sup> century.<sup>270</sup> The introduction of GALA, especially in light of the *Raad van State*'s coupling of the *evenredigheidsbeginsel* in article 3:4 paragraph 2 of GALA and the right to *nadeelcompensatie*, raised the question of which principle forms the legal basis for *nadeelcompensatie*.<sup>271</sup> Moreover, this coupling of the *égalité* principle to the *evenredigheidsbeginsel* in article 3:4 paragraph 2 of GALA was criticized because they concern two different types of proportionality.<sup>272</sup> The *evenredigheidsbeginsel* consists of a means-end analysis.<sup>273</sup> A means-end analysis differs from a proportionality analysis in terms of the *égalité* principle. In terms of a means-end analysis the focus is on the relationship between the public interests served and the private interests affected by the regulatory state actions, whereas proportionality focuses on the intensity of the effect of the infringement.<sup>274</sup> The question whether *nadeelcompensatie* is required only becomes applicable if there was an appropriate balance between the purpose sought to be achieved and the private interests

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<sup>269</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 116, 964.

<sup>270</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 464.

<sup>271</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 485. Article 3:4 paragraph 2 GALA codifies the proportionality principle (*evenredigheidsbeginsel*). See also BJ Schueler "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE van Maanen; BPM van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 95.

<sup>272</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 964. See also EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 485; BJ Schueler "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE van Maanen; BPM van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 95.

<sup>273</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 491.

<sup>274</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 491. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 119; See also JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 242.

affected by the regulatory interference.<sup>275</sup> The means-end analysis is closer to what is known as rationality analysis in South African law, whereas proportionality in terms of the *égalité* principle requires an additional assessment of the fairness of the effect of the regulatory action. Therefore, *nadeelcompensatie* can only be considered in the proportionality analysis. If there was no proportionality in the means-ends analysis the regulatory measure is invalid for being unnecessary and therefore unauthorised and it cannot be saved by the payment of *nadeelcompensatie*. In *Van Vlodrop*<sup>276</sup> the *Raad van State* for the first time recognised the *égalité* principle as an independent legal ground for the duty to pay *nadeelcompensatie*.<sup>277</sup> Furthermore, the *Raad van State* has since 2003 explicitly stated that the *égalité* principle no longer finds its foundation in article 3:4 paragraph 2 of GALA, thereby making it possible to consider *nadeelcompensatie* after the loss has occurred.<sup>278</sup> Therefore, it is now possible for an administrative decision which is proportionate in terms of article 3:4 paragraph 2 of GALA to be disproportionate in terms of the *égalité* principle.<sup>279</sup>

The development of the *égalité* principle in the *Raad van State* played a role in the civil law as well, as illustrated in the *Leffers*<sup>280</sup> and *Staat/Lavrijsen*<sup>281</sup> decisions of

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<sup>275</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483.

<sup>276</sup> ABRvS 6 May 1997, AB 1997, 229 (*Van Vlodrop*). MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 118-119.

<sup>277</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 965. See also E Engelhard; B van den Broek; F de Jong; A Keirse & E de Kezel "Let's think twice before we revise! 'Égalité' as the foundation of liability for lawful public sector acts" (2014) 10 *Utrecht Law Review* 55-76 at 58; BPM van Ravels "De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning" in PFA Bierbooms; H Pasman & GMF Sniijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 76.

<sup>278</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 119 states, with reference to ABRvS 12 November 2003, AB 2004, 95, that the *Raad van State* has uncoupled the *égalité* principle from article 3:4 paragraph 2 of GALA.

<sup>279</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 965.

<sup>280</sup> HR 18 January 1991, AB 1991, 241 (*Leffers*).

<sup>281</sup> HR 30 March 2001, AB 2001, 412 (*Staat/Lavrijsen*).

the *Hoge Raad*.<sup>282</sup> In both decisions the *Hoge Raad* explicitly recognised that state actions can be unlawful if it imposes a disproportionate burden.<sup>283</sup> This view is based on the *égalité* principle.<sup>284</sup> The implication of this construction that an otherwise lawful regulatory state action which imposes a disproportionate burden on an individual renders the regulatory state action unlawful and thereby gives rise to a duty to compensate the affected individual.<sup>285</sup> In *Staat/Lavrijsen* the *Hoge Raad* followed the *Raad van State* approach prior to the *Van Vlodrop* decision and coupled the *égalité* principle to article 3:4 paragraph 2 of GALA, which requires a means-ends analysis prior to taking decision or making legislation.<sup>286</sup> The implication of this decision is that the *Hoge Raad*'s jurisprudence in this respect is susceptible to the same criticism as that of the *Raad van State* prior to its uncoupling of the *égalité* principle and article 3:4 paragraph 2 of GALA.<sup>287</sup> However, the *égalité* principle, although explicitly recognised by the *Hoge Raad*, does not yet function as an independent legal basis

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<sup>282</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 119.

<sup>283</sup> BPM van Ravels "De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning" in PFA Bierbooms; H Pasman & GMF Snijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 73, 79. Van Ravels explains that the unlawfulness in *Leffers* related to the absence of balance of interests, whilst in the *Staat/Lavrijsen* the unlawfulness related to the state action itself that brought about the disproportionate burden.

<sup>284</sup> BPM van Ravels "De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning" in PFA Bierbooms; H Pasman & GMF Snijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 73.

<sup>285</sup> BPM van Ravels "De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning" in PFA Bierbooms; H Pasman & GMF Snijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 74. See also MJW van Casteren *Schadevergoeding bij rechtmatig EG-optreden: Een Europeesrechtelijke en rechtsvergelijkende studie* (1997) 89.

<sup>286</sup> BPM van Ravels "De reikwijdte van het beginsel van de gelijkheid voor de openbare lasten: Een grensverkenning" in PFA Bierbooms; H Pasman & GMF Snijders (eds) *Aspecten van aansprakelijkheid* (2005) 73-96 at 79-82. See also MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 120.

<sup>287</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 120.

for *nadeelcompensatie*.<sup>288</sup> Moreover, the *Hoge Raad*, despite criticism, does not yet acknowledge that the state can be liable for lawful regulatory actions.<sup>289</sup>

In the literature, the role played by other legal grounds than the *égalité* principle is considered in relation to *nadeelcompensatie*. These alternative grounds include the principle of legitimate expectations (*vertrouwensbeginsel*), legal certainty principle (*rechtzekerheid*), and the *evenredigheidsbeginsel* (principle of proportionality in the sense of means-ends proportionality).<sup>290</sup> The principle of legal certainty requires a level of confidence in the protection of vested rights and interests.<sup>291</sup> The principle of legal certainty and the principle of legitimate expectation are closely related. The legal certainty principle seeks to ensure that private property owners may legitimately rely on the duration of the decisions they make in regard to their property. In turn, these decisions are based on legitimate expectations created by the state.<sup>292</sup> De Jongh argues that the limited role played by the principle of legal certainty and the principle of legitimate expectation in both legislation and judicial reasoning is a clear indication that they cannot be regarded as an independent legal basis for *nadeelcompensatie*.<sup>293</sup> Moreover, De Jongh states that although the principle of legal certainty forms a relevant factor to consider in the question whether *nadeelcompensatie* should in a specific case be awarded, it is the *égalité* principle

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<sup>288</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 965.

<sup>289</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 120, 965. See the criticism in the discussion of the *evenredigheidsbeginsel* as legal ground for *nadeelcompensatie* below. Furthermore, see also EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>290</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 490.

<sup>291</sup> JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 234.

<sup>292</sup> JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 234.

<sup>293</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482.

that forms the underlying legal foundation for *nadeelcompensatie*.<sup>294</sup> The principle of legal certainty provides a ground of justification for the *nadeelcompensatie*, whereas the principle of legitimate expectation constitutes a relevant legal element in the testing of the infringing state action to the *égalité* principle.<sup>295</sup> These two principles play a role in the balancing of interests that should be done prior to regulatory interferences with property.<sup>296</sup> However, the fact that these two principles might be infringed by the regulatory measure does not by definition influence the decision whether to infringe upon private property rights. This decision is dependent on the interests that these principles serve in relation to interests served by the regulatory measure.<sup>297</sup> Furthermore, these principles only play a supplementary role in the determination of whether *nadeelcompensatie* is required.<sup>298</sup> The fact that the regulatory measure may infringe upon a property owner's legitimate expectation can influence the question whether there was a special burden, which is one of the two requirements of the *égalité* principle.<sup>299</sup> On the other hand, the infringement of the principle of legal certainty can influence the question of whether the burden was abnormal, which is the second requirement of *égalité* principle.<sup>300</sup> Therefore, none of these two principles forms an independent legal foundation for *nadeelcompensatie*;

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<sup>294</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483.

<sup>295</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482.

<sup>296</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482. See also JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 235.

<sup>297</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482.

<sup>298</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482. See also JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 235.

<sup>299</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482.

<sup>300</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 482-483.



they are only factors that are relevant in determining whether the *égalité* principle has been breached.<sup>301</sup>

Another alternative ground as legal basis for *nadeelcompensatie* is the *evenredigheidsbeginsel*.<sup>302</sup> In terms of the *evenredigheidsbeginsel*, the interests served by the regulatory measure must be proportionate to the interests affected by such measure for it to be lawful.<sup>303</sup> If there was no weighing of interests prior to effecting the regulatory measure the regulatory measure is deemed to constitute an unlawful state action with a concomitant duty to pay compensation.<sup>304</sup> According to De Jongh, this point of departure influenced academics to refer to the *evenredigheidsbeginsel* as the legal foundation for *nadeelcompensatie*.<sup>305</sup> This is also the approach followed by the *Hoge Raad* in civil cases.<sup>306</sup> Scheuler argues that the provision of *nadeelcompensatie* can constitute one method to prevent a decision from being unlawful because it infringes upon the proportionality principle in terms of a means-ends analysis.<sup>307</sup> Furthermore, if the regulatory interference is disproportionate, for example because there were other, less invasive means to fulfil the purpose (ends), it constitutes a ground for invalidating the regulatory measure.

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<sup>301</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483. See also JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 236.

<sup>302</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483-489. See also JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 241-246.

<sup>303</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483.

<sup>304</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483. See also JE Hoitink "Schadevergoeding in het omgevingsrecht: Speurtocht naar 'verklarende principes'" in JE Hoitink; GE Van Maanen; BPM Van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 201-259 at 241.

<sup>305</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 483.

<sup>306</sup> See the discussion above.

<sup>307</sup> Schueler BJ "Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht" in JE Hoitink; GE van Maanen; BPM van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 114-115.



Compensation may not be used to buy the validity of inherently unlawful regulatory measures.<sup>308</sup> De Jongh criticises this approach and states that it only shifts the boundary between lawful and unlawful regulatory measures to the boundary between lawful and doubtful instances and the boundary between doubtful and unlawful instances, thereby creating a grey area.<sup>309</sup> De Jongh states that it is already difficult to draw the distinction between lawful and unlawful state actions and the creation of a grey area does not resolve the issue.<sup>310</sup> Moreover, to award *nadeelcompensatie* in terms of the *evenredigheidsbeginsel* does not explain the conditions upon which, in a specific case, compensation should be provided.<sup>311</sup> Therefore, an additional legal ground, other than the *evenredigheidsbeginsel*, is needed to explain the instances when the loss that resulted from a regulatory state action (therefore after the fact) should be compensated to prevent the state action from constituting an unlawful action.<sup>312</sup> Another important criticism raised against the *evenredigheidsbeginsel* theory is that it revolves around a distinction between lawful and unlawful actions and does not bring about clarity regarding the legal foundation for compensation for lawful state action.<sup>313</sup> Compensation for lawful state action applies to loss that resulted from state action that is authorised by law and was exercised in compliance with the relevant authorising statute; therefore, lawful state action.<sup>314</sup> However, compensation for unlawful action applies to loss that results from state action which was in conflict

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<sup>308</sup> Schueler BJ “Goede besluiten met slechte gevolgen. De verplichting tot nadeelcompensatie in het bestuursrecht” in JE Hoitink; GE van Maanen; BPM van Ravels & BJ Schueler (eds) *Schadevergoeding bij rechtmatige overheidsdaad* (2002) 91-199 at 117.

<sup>309</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 484.

<sup>310</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 484.

<sup>311</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 487 states that there is no criterion stipulated that could help determine whether, in a specific instance, compensation should or should not be provided or that the instances when compensation will not be possible.

<sup>312</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>313</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>314</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

with the law, therefore unlawful.<sup>315</sup> De Jongh argues that it is not only better dogmatically to use the correct terminology, but she also emphasises that the rights and duties of each type of state action are different.<sup>316</sup> The compensation for unlawful state action is full compensation as a point of departure, whereas the compensation for lawful state action is usually only compensation for loss that falls outside the normal social risk that everyone is expected to carry without compensation (*normaal maatschappelijk risico*).<sup>317</sup>

The criticism against the *evenredigheidsbeginsel* indicates that it cannot be recognised as the independent legal ground for *nadeelcompensatie*. The *evenredigheidsbeginsel* only plays a role in determining whether the regulatory state action was lawful or unlawful.<sup>318</sup> The question whether *nadeelcompensatie* is applicable only enters the picture when the regulatory state action is lawful in accordance with the *evenredigheidsbeginsel*.<sup>319</sup> Despite the arguments regarding the existence of other legal grounds besides the *égalité* principle, De Jongh states that there is general consensus amongst scholars that the *égalité* principle forms the independent legal ground for a right to *nadeelcompensatie* and that the other principles are only of subsidiary importance in the sense of having an influence on the question whether, in a specific case, an abnormal and a special burden exist.<sup>320</sup>

The scope and application of the *égalité* principle is often problematic in Dutch law. In Dutch law, unlike French law, the *égalité* principle is generally viewed as the

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<sup>315</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>316</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>317</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 484.

<sup>318</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>319</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 488.

<sup>320</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 491.

main principle governing compensation for lawful state action.<sup>321</sup> In addition to the *égalité* principle, French law also recognises a risk principle in terms of which compensation for lawful state action can be awarded.<sup>322</sup> Tjepkema states that although Dutch law does not have a similar risk principle, there may be instances where loss results from hazardous state actions that might guide Dutch courts to award *nadeelcompensatie* in terms of the *égalité* principle.<sup>323</sup> Tjepkema argues that the criteria applicable to limiting state liability in these instances are not derived from the *égalité* principle but from civil law, in particular the fault of the victim and the notion that insignificant (*de minimis*) damages should not be compensated.<sup>324</sup> The irrelevance of the special and abnormal burden in limiting state liability for loss that results from hazardous state actions might lead to an incoherent no-fault state liability doctrine.<sup>325</sup> According to De Jongh, the loss that results from hazardous state actions does not belong in the category of compensation for lawful state actions but under the category of compensation for unlawful state actions.<sup>326</sup> Tjepkema argues that the *égalité* principle should only be applicable to instances where the loss is the result of a public burden, which he defines as “damage which is consciously caused to an individual by a public authority, and which is the necessary and inevitable

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<sup>321</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 966.

<sup>322</sup> See the discussion on French law above. See MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 177-188 for a discussion of the risk principle as basis for compensation.

<sup>323</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 907-915, 970. Tjepkema mentions the HR 30 March 2001, AB 2001, 412 (*Staat/Lavrijsen*) decision as an example. The case concerned a third party (Lavrijsen) who suffered financial loss due to the police's search and seizure of the premises which Lavrijsen rented and used to farm with pigs. The owner of the premises was suspected of selling illegal substances. The loss was the result of a police officer who mistakenly left the doors to the pig house open, which led to the temporary malfunctioning of the ventilation system. This inhibited the pigs' growth, which resulted in a loss of income for Lavrijsen. The *Hoge Raad* held that the state action was lawful but it breached the *égalité* principle and Lavrijsen was therefore entitled to compensation.

<sup>324</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 970.

<sup>325</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 970.

<sup>326</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 495.

consequence of an action performed in the general interest”.<sup>327</sup> The requirement that the action should be taken in the public interest is important, since the public interest justifies the payment of compensation.<sup>328</sup> The public interest may, as a rule, not be used as the basis to refuse a right to compensation. However, an exception exists where the general interest is served by deliberately making a distinction between certain groups. In these instances the unequal burden will be in the general interest and would not give rise to a duty to pay compensation.<sup>329</sup> Furthermore, the fact that the loss has to result from a conscious choice for a specific measure implies that a balancing of interests took place.<sup>330</sup> Tjepkema argues that “conscious” should not be interpreted narrowly to only apply to situations where the loss was foreseen, but should be given a wide interpretation to apply to situations where the state accepted that the loss that results from the regulatory state action is a necessary and inevitable consequence (inherent to the specific means chosen) of serving a public purpose.<sup>331</sup>

The requirements that the burden should be both special and abnormal before an affected party is entitled to claim compensation in terms of the *égalité* principle fulfil the function of limiting state liability. However, it is not always easy to determine when these two requirements have been complied with.<sup>332</sup> The special burden

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<sup>327</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 200, 279, 968.

<sup>328</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 968.

<sup>329</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 968.

<sup>330</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 968.

<sup>331</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 210, 216, 934, 969. Tjepkema states that the *égalité* principle only applies where causing the regulatory burden is the necessary and inevitable result of a regulatory state action which serves the public interest. For example, legislation banning the trade in a product that is harmful to the public health. Furthermore, Tjepkema states that *égalité* principle can also be applicable to situations where the loss is merely a side-effect of an action performed in the public interest. For example, the decision to replace a main road could have an adverse economic impact on commercial businesses.

<sup>332</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 491.

requirement plays a more limited role than the abnormal burden requirement.<sup>333</sup>

Tjepkema argues that this is so because courts seldom test the relevant lawful regulatory state action against reference groups to determine whether the burden qualifies as special.<sup>334</sup> Moreover, Tjepkema states that the special burden requirement should not amount to a comparison between the affected property holder and others and argues that the comparison takes place at a more abstract level.<sup>335</sup> Therefore, the burden is special when only one individual is affected by a legal act.<sup>336</sup> However, Tjepkema emphasises that the determining factor will in almost all cases be whether the burden is abnormal.<sup>337</sup> Abnormality is the umbrella term which covers various criteria that are useful to determine whether there is a duty to pay compensation.<sup>338</sup> The relevant criteria included under the term “abnormal” include the existence of loss that falls outside the normal societal risks that owners are required to bear without the payment of compensation (*normaal maatschappelijk risico*), loss that falls outside normal business risks (*normaal ondernemersrisico*) and loss that cannot be attributed to the acceptance of risk (*risico-aanvaarding*).<sup>339</sup> A combination of these criteria will usually determine whether liability exists but according to Tjepkema, the normal societal risk criterion is the most important since it

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<sup>333</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 475. MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 972 states that the special burden requirement plays an important role but in practice it is often not explicitly tested against.

<sup>334</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 381, 972.

<sup>335</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 972.

<sup>336</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 972.

<sup>337</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 972. See also EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 458.

<sup>338</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 973.

<sup>339</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 973.

covers many different aspects, including the nature of the measure that effected the burden and the nature, extent, intensity and the foreseeability of the burden.<sup>340</sup> Once it has been established that the regulatory interference with property constitutes an abnormal burden, one of the elements of the *égalité* principle has been satisfied. If the second requirement of the *égalité* principle, namely that it is a special burden, is also complied with an obligation to pay *nadeelcompensatie* arises.<sup>341</sup> De Jongh states that these two requirements are interrelated - the existence of a special burden plays a role in the determination of whether the burden is abnormal, and the existence of an abnormal burden plays a role in the determination of whether the burden is special.<sup>342</sup>

Since the explicit recognition of the *égalité* principle, its scope and application has increasingly become clearer. De Jongh argues that codification of this principle will lead to even more clarity of the principle's scope and application and lead to greater legal uniformity.<sup>343</sup> New legislation, the *Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten* of 31 January 2013, provides a clearer division of jurisdiction for claims based on lawful or unlawful state actions.<sup>344</sup> This Act includes a separate section, which has not yet entered into force, that introduces a general compensation rule which transforms the *égalité* principle into a general

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<sup>340</sup> MKG Tjepkema *Nadeelcompensatie op basis van het égalitébeginsel: Een onderzoek naar nationaal, Frans en Europees recht* (2010) 516, 973. Previously, it was uncertain whether the affected individual's financial capacity (*draagkracht*) played a role in the determination whether the burden was abnormal (also referred to as the *draagkrachtbeginsel*). However, in HR 3 April 1998, AB 1998, 256 (*Meiland*) the *Hoge Raad* held that the financial position of the individual or the possibility that the affected individual can generate income through other business activities, are too subjective and should not play a role in determining whether the burden was abnormal. See also EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 459.

<sup>341</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 489-490.

<sup>342</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 480.

<sup>343</sup> EL de Jongh *De rechtsgronden voor nadeelcompensatie in rechtshistorisch perspectief* (2012) 493.

<sup>344</sup> E Engelhard; B van den Broek; F de Jong; A Keirse & E de Kezel "Let's think twice before we revise! '*Egalité*' as the foundation of liability for lawful public sector acts" (2014) 10 *Utrecht Law Review* 55-76 at 56.



ground for the liability of public authorities for loss that arises from lawful state actions.<sup>345</sup> According to Engelhard *et al*, the idea is to incorporate this into the General Administrative Law Act (GALA).<sup>346</sup>

### 3 4 Overheidsaansprakelijkheid in Belgian law

The traditional point of departure in Belgian law is that infringements of property imposed in the public interest are not compensated unless the aggrieved citizen could prove that the state acted unlawfully or if compensation is expressly provided for in the applicable statute or by-law.<sup>347</sup> However, in the past this often resulted in unfairness. Verrijdt highlights three judicial developments that detract from the requirement of fault or the express legislative provision of compensation, namely the recognition of *de facto* expropriation (referred to as constructive expropriation in South African law or regulatory takings in US law) by the Belgian Constitutional Court and the European Court of Human Rights (ECHR);<sup>348</sup> the adoption of a stricter proportionality test compared to the proportionality test in article 1 of the First Protocol to the European Convention on Human Rights 1950 (article 1 of the First Protocol) by the Belgian *Hof van Cassatie* (Supreme Court); and recognition by both the *Hof van Cassatie* and the Constitutional Court of the equality before public

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<sup>345</sup> E Engelhard; B van den Broek; F de Jong; A Keirse & E de Kezel "Let's think twice before we revise! 'Égalité' as the foundation of liability for lawful public sector acts" (2014) 10 *Utrecht Law Review* 55-76 at 56.

<sup>346</sup> E Engelhard; B van den Broek; F de Jong; A Keirse & E de Kezel "Let's think twice before we revise! 'Égalité' as the foundation of liability for lawful public sector acts" (2014) 10 *Utrecht Law Review* 55-76 at 56.

<sup>347</sup> J Toury & M Denys "Vergoeding van erfdienstbaarheden van openbaar nut. De leer van de quasioneigening ten volle erkend" 2012 *Tijdschrift voor Notarissen* 465-477 at 468.

<sup>348</sup> See chapter 2 for a discussion on the difference in terminology.



burdens principle (*égalité* principle) as a general legal principle.<sup>349</sup> These three developments make it possible for an aggrieved claimant to claim compensation for excessive regulatory measures, even in the absence of an unlawful state action or a statutory right to compensation.

To understand the first judicial development, it is necessary to consider how limitations of property rights are categorised in Belgian law. Courts draw a distinction between expropriation on the one hand and regulatory measures that limit property rights on the other hand.<sup>350</sup> Traditionally, article 16 of the Constitution does not apply to the limitations of property rights brought about by regulatory measures.<sup>351</sup> According to both the *Hof van Cassatie* and the Belgian Constitutional Court, article 16 of the *Belgische Grondwet* of 17 February 1994 (Belgian Constitution)<sup>352</sup> is only applicable where there is an expropriation in the sense of a transfer of title.<sup>353</sup> However, the Belgian Constitutional Court recognises the notion of *de facto*

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<sup>349</sup> W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdiensbaarheid van openbaar nut* (2012) 195-251 at 245.

<sup>350</sup> S Verbist “Het Grondwettelijk Hof verruimt onterecht het toepassingsgebied van artikel 16 Grondwet” 2010 *Tijdschrift voor Bouwrecht en Onroerend Goed* 299-304 at 300.

<sup>351</sup> S Verbist “Het Grondwettelijk Hof verruimt onterecht het toepassingsgebied van artikel 16 Grondwet” 2010 *Tijdschrift voor Bouwrecht en Onroerend Goed* 299-304 at 300. See also W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdiensbaarheid van openbaar nut* (2012) 195-251 at 217.

<sup>352</sup> Article 16 of the Belgian Constitution provides that “[n]o one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by the law in return for fair compensation paid beforehand”. See [http://www.dekamer.be/kvvcr/pdf\\_sections/publications/constitution/grondwetEN.pdf](http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf) (accessed on 09.08.2014) for an official English translation of the Belgian Constitution.

<sup>353</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 270; S Verbist “Het Grondwettelijk Hof verruimt onterecht het toepassingsgebied van artikel 16 Grondwet” 2010 *Tijdschrift voor Bouwrecht en Onroerend Goed* 299-304 at 302.

expropriation of property.<sup>354</sup> This development was influenced by jurisprudence of the ECHR dealing with article 1 of the First Protocol.<sup>355</sup> Conversely, the *Hof van Cassatie* rejects the notion of constructive expropriation<sup>356</sup> and holds on to the limited application of article 16 to instances of actual expropriation.<sup>357</sup>

Lierman states that the influence of article 1 of the First Protocol goes further than the recognition of *de facto* expropriation of property.<sup>358</sup> The Belgian Constitutional Court has repeatedly held that the guarantee in article 16 of the Constitution, which provides that property may only be expropriated in terms of law and the payment of fair compensation, is analogous to the protection in article 1 of the First Protocol.<sup>359</sup> The main difference between article 16 of the Constitution and

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<sup>354</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 270. W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 197 fn 10 states that the term *de facto* expropriation was introduced on the same day in the jurisprudence of both the Belgian Constitutional Court as well as the ECHR.

<sup>355</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 271.

<sup>356</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 273. See also W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 198.

<sup>357</sup> W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 217.

<sup>358</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 273.

<sup>359</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 271. S Verbist “Het Grondwettelijk Hof verruimt onterecht het toepassingsgebied van artikel 16 Grondwet” 2010 *Tijdschrift voor Bouwrecht en*

article 1 of the First Protocol relates to the scope of application and the protection awarded by the respective provisions. Article 1 of the First Protocol has a wider field of application than article 16 of the Constitution. Article 16 of the Constitution only applies to formal expropriation, whereas article 1 of the First Protocol applies to expropriation as well as regulatory state action.<sup>360</sup> Therefore, in terms of article 16 of the Constitution, compensation is only required when the state formally expropriated property. However, compensation may be required for expropriation as well as some excessive regulatory state actions in terms of article 1 of the First Protocol. Verrijdt argues that although “analogous” does not mean identical, reading these two sections together widens the scope of article 16’s application, allowing it to be interpreted in light of the jurisprudence of the ECHR.<sup>361</sup> The implication of this analogy is that any infringement of property rights has to comply with the respective guarantees in article 16 of the Constitution as well as article 1 of the First Protocol.<sup>362</sup> This would imply that any limitation of property rights, not only expropriation, may be subject to the compensation requirement in article 16 of the Constitution.<sup>363</sup>

The second judicial development relates to the various courts’ approach to the proportionality test. The *Hof van Cassatie* adopts a more stringent proportionality

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*Onroerend Goed* 299-304 at 302 argues that the Court’s analogous approach serves to give as wide as possible protection to property rights.

<sup>360</sup> A Alen & W Verrijdt “Recente evoluties inzake de bescherming van het eigendomsrecht in de rechtspraak van het Grondwettelijk Hof” in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 1-26 at 2-5 points out that the scope of article 16 of the Constitution has been extended over time to include *de facto* expropriation.

<sup>361</sup> W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 220.

<sup>362</sup> S Verbist “Het Grondwettelijk Hof verruimt onterecht het toepassingsgebied van artikel 16 Grondwet” 2010 *Tijdschrift voor Bouwrecht en Onroerend Goed* 299-304 at 302.

<sup>363</sup> S Verbist “Het Grondwettelijk Hof verruimt onterecht het toepassingsgebied van artikel 16 Grondwet” 2010 *Tijdschrift voor Bouwrecht en Onroerend Goed* 299-304 at 302.

analysis than the ECHR and the Constitutional Court.<sup>364</sup> The ECHR and the Constitutional Court regard the possibility of compensation merely as one of the elements that should be considered in the proportionality analysis. Article 1 of the First Protocol does not guarantee an inherent right to compensation for the normal regulation of property but the existence, scope and mode of compensation play a role in the proportionality test.<sup>365</sup> Therefore, the absence of compensation would not necessarily amount to an infringement of article 1 of the First Protocol. However, the *Hof van Cassatie* regards the presence of compensation as a fundamental requirement; the terms of the compensation are also incorporated into the proportionality test.<sup>366</sup> Instead of recognising a third category, as the Constitutional Court and the ECHR do, namely *de facto* expropriation that requires compensation, the *Hof van Cassatie* employs a strict definition of expropriation. However, the *Hof van Cassatie* created a category of non-expropriatory regulatory interferences with an owner's use and enjoyment of his property rights that cannot be upheld without compensation.<sup>367</sup> The compensation in these excessive regulatory instances is non-expropriatory and is founded on the *égalité* principle.

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<sup>364</sup> W Verrijdt "Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten" in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 227.

<sup>365</sup> A Alen & W Verrijdt "Recente evoluties inzake de bescherming van het eigendomsrecht in de rechtspraak van het Grondwettelijk Hof" in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 1-26 at 4.

<sup>366</sup> W Verrijdt "Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten" in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 227.

<sup>367</sup> W Verrijdt "Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten" in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdienstbaarheid van openbaar nut* (2012) 195-251 at 228.

The third judicial development is the recognition of the *égalité* principle as a general legal principle.<sup>368</sup> General legal principles are defined as norms which are directly or indirectly inferred by judges as underlying the general legal order.<sup>369</sup> General legal principles are regarded as fundamental principles that allow judges to complete or supplement incomplete legislation. However, general legal principles cannot be applied in a manner that goes against the express wishes of the legislature.<sup>370</sup> A distinction is therefore drawn between general legal principles with a legislative value and those with a constitutional value.<sup>371</sup> General legal principles with a constitutional value are regarded as supplementary to the Constitution and are hierarchically above legislation.<sup>372</sup> In the *Immo Antwerpia* decision,<sup>373</sup> the *Hof van Cassatie* recognised expressly, for the first time, that the *égalité* principle can form the basis for state liability.<sup>374</sup> Previously the equality before public burdens principle was incorporated into the law of nuisance (*abnormale burenhinder*) and served as a standard against which nuisance was tested, especially nuisance relating to public works.<sup>375</sup> However, the *Hof van Cassatie* held that the *égalité* principle is founded in article 16 of the Constitution and thereby uncoupled the equality before public

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<sup>368</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 124.

<sup>369</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 124.

<sup>370</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 124.

<sup>371</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 124.

<sup>372</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 124.

<sup>373</sup> Cass 24 June 2010 (*Immo Antwerpia*).

<sup>374</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 120.

<sup>375</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 269. See also W Verrijdt “Naar een principieel recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdiensbaarheid van openbaar nut* (2012) 195-251 at 235.

burdens principle from the law of nuisance.<sup>376</sup> This approach by the *Hof van Cassatie* influenced the Belgian Constitutional Court that in the *Mafar*<sup>377</sup> decision held that it could test legislation providing compensation, or the absence thereof, against the *égalité* principle.<sup>378</sup> Therefore, in *Mafar* the Constitutional Court confirmed the constitutional value of the principle of equality before public burdens.<sup>379</sup> The implication of recognising a legal principle with constitutional value is that, in principle, a right to compensation does exist and the legislature can, within certain limits, determine the mode of such compensation. However, if legislation does not provide for compensation for the unfair or disproportionate part of a loss caused by its implementation, the court may step in to correct the lacuna.<sup>380</sup> General legal principles with legislative value, on the other hand, are only supplementary to the particular legislation and are hierarchically only above executive decisions of the administrative organs of state.<sup>381</sup>

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<sup>376</sup> S Verbist “De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet” in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 342.

<sup>377</sup> GwH 19 April 2012 (*Mafar*).

<sup>378</sup> S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 275.

<sup>379</sup> GwH 19 April 2012 (*Mafar*). S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 277.

<sup>380</sup> W Verrijdt “Naar een principiële recht op vergoeding: Artikel 1 van het Eerste Aanvullend Protocol bij het EVRM en het beginsel van de gelijkheid van de burgers voor de openbare lasten” in R Palmans; V Sagaert & W Verrijdt (eds) *Eigendomsbeperkingen: De erfdiensbaarheid van openbaar nut* (2012) 195-251 at 241.

<sup>381</sup> J Geens & S Verbist “De gelijkheid voor de openbare lasten als grondslag voor overheidsaansprakelijkheid” 2011 *Burger Bestuur & Beleid* 120-129 at 124. See also S Lierman & P van de Weyer “Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?” in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 274. Lierman and Van de Weyer argue that the recognition of the equality before public burdens principle as an autonomous legal principle by the *Hof van Cassatie* is difficult to reconcile with this Court’s previous jurisprudence that public burdens in the public interest does, in principle, not give rise to compensation.



The *Hof van Cassatie* and the Constitutional Court are at odds as to the foundation of the *égalité* principle. According to the *Hof van Cassatie*, the principle is founded in article 16 of the Constitution, whereas the Constitutional Court finds the principle's foundation in articles 10 and 11 of the Constitution.<sup>382</sup> Because the equality before public burdens principle is recognised as a principle with constitutional value, it is necessary to find the legal basis on which it is founded.<sup>383</sup> Viewing article 16 as the foundation for the *égalité* principle leads to the conclusion that a regulatory limitation of property that infringes the *égalité* principle also infringes article 16 of the Constitution.<sup>384</sup> This is a significant departure from the Court's traditional stance that article 16 is only applicable in the event of a formal expropriation and not where property rights have only been limited.<sup>385</sup> On the other hand, viewing articles 10 and 11 as the foundation for the *égalité* principle is not reconcilable with the *égalité* principle because no right to compensation arises when article 10 or 11 of the Constitution has been infringed by lawful state action.<sup>386</sup> Verbist argues that it is more accurate to view the equality before public burdens principle as emanating from article 16 of the Constitution rather than as founded in

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<sup>382</sup> S Lierman & P van de Weyer "Rechtspreken aan de hand van een pluraliteit van rechtsnormen: Meer of minderwaarde voor de rechtsbescherming bij rechtmatige overheidsdaad?" in F Deruyck; G Goethals; L Huybrechts; J Leclercq; J Rozie; M Rozie; P Traest & R Verstraeten (eds) *Amicus curiae liber amicorum Marc de Swaef* (2013) 267-279 at 278.

<sup>383</sup> S Verbist "De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet" in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 346.

<sup>384</sup> S Verbist "De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet" in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 343.

<sup>385</sup> S Verbist "De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet" in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 346.

<sup>386</sup> S Verbist "De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet" in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 346.



article 16.<sup>387</sup> Another possibility is to view articles 10 and 11 of the Constitution read with article 1 of the First Protocol as the legal foundation for the *égalité* principle.<sup>388</sup>

In conclusion, Belgian law does provide one solution to saving otherwise lawful and legitimate regulatory measures from being invalidated on the basis that they impose a disproportionate burden on one or a small group of property owners. Similar to French and Dutch law, Belgian law recognises that the payment of non-expropriatory compensation in terms of the *égalité* principle can equalise the excessiveness of the regulatory burden and thereby even out the otherwise disproportionate burden. However, the Belgian Constitutional Court and the *Hof van Cassatie* have conflicting opinions on the foundation of and the application of the *égalité* principle. Furthermore, in addition to the *égalité* approach, the Belgian Constitutional Court also recognises the notion of constructive expropriation.

## 4 Conclusion

In chapter 1 it is stated that it may not always be appropriate to declare otherwise lawful and legitimate regulatory measures invalid because they impose a harsh and excessive burden on one or a small group of property owners. A comparative overview of foreign law indicates that there are alternative approaches to declare these excessive regulatory measures invalid. The foreign law approaches discussed in chapters 2 and 3 point out that the payment of compensation may provide an alternative to invalidation in the sense of softening the excessiveness of the burden

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<sup>387</sup> S Verbist “De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet” in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 345.

<sup>388</sup> S Verbist “De gelijkheid voor de openbare lasten en artikel 16 van de Grondwet” in M Boes; J Ghysels; D Lindemans & R Palmans (eds) *Vijftig jaar bescherming van het eigendomsrecht: Liber Amicorum Martin Denys* (2012) 341-348 at 346-347.

and thereby prevent the excessive non-expropriatory regulatory measure from being disproportionate and arbitrary. However, the foreign jurisdictions discussed in this thesis use different legal strategies upon which to found a claim for this form of compensation. In chapter 2 the possibility of constructive expropriation was considered. In terms of the constructive expropriation approach, the courts uphold the excessive regulatory interference with property rights by transforming the regulatory measure into expropriation and requiring the payment of compensation, even though no formal expropriation has occurred. It is argued that the notion of constructive expropriation is unique to the US, Irish and Swiss law context and cannot be easily transferred to South African law. Furthermore, the recognition of the notion of constructive expropriation seems unlikely, if not impossible, in South African law.<sup>389</sup>

In this chapter, a different approach is discussed with reference to German, Dutch and Belgian law. The notion of constructive expropriation was considered in German law. The civil and administrative courts developed and applied different strategies that resembled constructive expropriation. However, neither the civil courts nor the administrative courts had jurisdiction to consider whether excessive regulatory measures amounted to expropriation and thereby required compensation. In *Naßauskiesung*,<sup>390</sup> the Federal Constitutional Court rejected the possibility of constructive expropriation on the basis of the constitutional requirements for a valid expropriation in article 14.3 of the Basic Law. The Federal Constitutional Court draws a categorical distinction between deprivation and expropriation. Furthermore, the Federal Constitutional Court held that the correct procedure for an aggrieved claimant is to challenge the validity of the excessive regulatory measure against

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<sup>389</sup> See chapter 2 for a discussion of constructive expropriation.

<sup>390</sup> *BVerfGE* 58, 300 (1981).

article 14 of the Basic Law. If the excessive regulatory interference is in conflict with article 14 because it imposes a disproportionate burden on the claimant, the regulatory measure should be invalidated. The excessive regulatory measure cannot be upheld on the condition that compensation should be paid. Therefore, the courts are not able to transform excessive regulatory measures into expropriation and thereby require the state to pay compensation.

In *Naßauskiesung* the Federal Constitutional Court mentioned that there may be instances when it cannot be expected of the affected property owner to bear the excessive and harsh burden imposed by the excessive regulatory statute but the effects of the regulatory statute as such do not justify a finding of unconstitutionality. In these instances it may be appropriate to consider the payment of compensation to even out the disproportionality of the excessive burden. The possibility of equalisation measures was only mentioned in *Naßauskiesung* but in *Denkmalschutz*<sup>391</sup> the Federal Constitutional Court set out the validity requirements for equalisation measures. In *Denkmalschutz* the Federal Constitutional Court held that although equalisation measures may be utilised to soften the harsh and excessiveness of the burden on the affected property owner and thereby prevent the excessive regulatory measure from being disproportionate, it is only appropriate in exceptional circumstances since the legislature should, as a rule, avoid imposing disproportionate burdens on property owners. Equalisation measures must be explicitly provided for in the particular regulatory statute, which must set out clearly and in detail when the equalisation measures will become applicable. Non-monetary equalisation measures such as transitional measures, exception and exemption measures take precedence over monetary equalisation. If the particular statute provides for monetary compensation, it should stipulate the criteria that would entitle

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<sup>391</sup> BVerfGE 100, 226 (1999).

a claimant to compensation and how the amount of compensation should be calculated. A vague or blanket provision will not constitute a valid equalisation measure to prevent the regulatory burden from being disproportionate. The payment of compensation in this regard is of a non-expropriatory nature since no expropriation has occurred. The inclusion of a compensation provision in a regulatory statute is aimed at softening the harsh and excessive burden that may result in the application of the particular regulatory statute and thereby prevent the statute from being disproportionate and unconstitutional. The German equalisation approach therefore poses a viable alternative to the invalidation of excessive regulatory measures discussed in chapter 1. The statutory provision of compensation in legislation does not seem foreign to South African law and various South African statutes do contain non-expropriatory compensation provisions.<sup>392</sup>

Equalisation measures in German law are only applicable in exceptional circumstances. A similar, but less strict, approach to equalisation measures exists in French, Dutch and Belgian law. The legislature in French, Dutch and Belgian law often specifically provides non-expropriatory compensation in a particular regulatory statute that may impose a harsh and excessive regulatory burden on one or a small group of property owners. However, unlike German law, the French, Dutch and Belgian courts may award compensation to affected property owners even in the absence of such specific statutory authorisation. Moreover, the equalisation approach in French, Dutch and Belgian law is generally almost always monetary compensation, whereas monetary compensation is the relief of last resort in German law. The otherwise lawful regulatory statute would in German law be declared invalid if the effects of the regulatory statute effect a disproportionate burden and no equalisation compensation was specifically provided for. The judicial authority to

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<sup>392</sup> See the discussion of non-expropriatory compensation in South African law in chapter 4.

award compensation in the absence of specific statutory authorisation in French, Dutch and Belgian law is founded on the *égalité* principle.

The *égalité* principle developed in French law and was transferred to Dutch and Belgian law. An aggrieved property owner may be entitled to compensation under the *égalité* principle if the burden that results from the regulatory statute complies with both the *spécialité* and the *anormalité* requirements. A burden is special if the regulatory measure is only applicable to one individual owner or a small group of property owners in comparison to other similarly situated property owners. Furthermore, a burden is abnormal if the loss is significant and falls outside the loss that accompanies the normal social risks or normal business risks that owners are required to endure without the payment of compensation. The special burden requirement plays a more limited role in Dutch law than in French law. The special burden requirement is often not explicitly considered in a specific given case by the Dutch courts. Therefore, in Dutch law, the existence of an abnormal burden is the determining factor whether a duty to pay compensation in terms of the *égalité* principle exists. Belgian law follows the Dutch law approach with regard to the existence of the criteria necessary for the application of the *égalité* principle.

Although compensation in terms of the *égalité* principle may constitute one alternative remedy to the invalidation of excessive regulatory measures discussed in chapter 1, it may not be the best or a viable alternative. The *égalité* principle is not unproblematic or without shortcomings. In French law, the *égalité* principle forms only one of two bases for state liability for otherwise lawful regulatory state action. Therefore, the *égalité* principle has limited application in French law. In Dutch law, the foundation for a claim for non-expropriatory compensation (*nadeelcompensatie*) for loss that results from an excessive regulatory measure is controversial. It is

generally accepted in Dutch law that the *égalité* principle forms the independent and autonomous foundation for such compensation. In Belgian law, the Belgian Supreme Court and Belgian Constitutional Courts are at odds as to the foundation and application of the *égalité* principle. Furthermore, in addition to the *égalité* principle, the Belgian Constitutional Court also recognises the notion of constructive expropriation. However, this approach is strongly criticised by the Belgian Supreme Court and academic scholars.

In conclusion, the French, Dutch and Belgian law approach of awarding non-expropriatory compensation in terms of the *égalité* principle fulfils the same function as equalisation measures approach in German law. The only difference is that compensation in terms of the *égalité* principle is not restricted to legislation that explicitly provides for compensation. If the burden imposed by the regulatory measure is both special and abnormal, the French, Dutch and Belgian courts may award compensation in terms of the *égalité* principle even though there is no statutory basis for any compensation. The legislature's intention plays a limited role in the courts' determination if compensation should be awarded for the excessive non-expropriatory regulatory measure. If the legislature wishes to exclude the possibility of compensation it has to do so explicitly.

The German equalisation solution is strict and cannot prevent excessive regulatory measures from invalidity if no compensation was explicitly provided for in the specific statute. In this case, the French, Dutch and Belgian *égalité* solution may come into play. In chapter 4 the possibility of awarding non-expropriatory compensation in the absence of statutory authority for excessive regulatory measures is considered.

## Chapter 4

# Non-expropriatory compensation for excessive regulation in South African law

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## 1 Introduction

The previous two chapters show that constructive expropriation and equalisation measures are two possible remedies that may save necessary and otherwise legitimate and lawful regulatory limitations of property that impose excessive burdens on an individual or a small group of property owners. Constructive expropriation is a strategy that is followed in some jurisdictions, particularly in US, Irish and Swiss law, which allows the courts to uphold excessive regulatory measures by requiring the state to pay compensation although the infringement of property did not constitute formal expropriation. In chapter 2 it is concluded that constructive expropriation is inappropriate, and perhaps even impossible, in South African law in light of the *FNB* methodology and the Constitutional Court's recent dictum in *Agri SA* regarding the distinction between deprivation and expropriation.<sup>1</sup>

However, the previous chapter indicates that there are alternative approaches to constructive expropriation that will also allow courts to recognise a right to compensation without having to transform the excessive regulatory measure into expropriation of property. In German law, the legislature often provides for equalisation measures, which need not always be monetary, in the legislation that authorises the regulatory measure resulting in excessive and disproportionate burdens being imposed on individual property owners and that would, in the absence of the equalisation measures, probably be declared invalid for excessive regulation. The analysis of German law in chapter 3 indicates that an otherwise lawful regulatory state action that imposes a disproportionate burden can be saved if equalisation measures aimed to prevent the burden from being disproportionate are specifically provided for in the statute. The nature and extent of the appropriate equalisation

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<sup>1</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

measures must be identified and the criteria when a claimant will be entitled to equalisation measures must be set out in the authorising legislation; it is not a judicial remedy. The Federal Constitutional Court regards vague, catch-all statutory equalisation provisions as insufficient; the regulatory statute will not be saved from invalidity by such a vague provision.

Unlike German law, French, Dutch and Belgian law allows the courts to award compensation even in the absence of statutory equalisation provisions, on the basis of the *égalité* principle that originated in French law. The *égalité* principle is a manifestation of the equality principle and requires that burdens that result from regulatory state actions taken in the public interest should be distributed evenly amongst the public as a whole. The *égalité* principle is regarded as an unwritten principle of constitutional value. Therefore, compensation for excessive or unequally distributed regulatory burdens is not awarded on the basis of a constitutional property clause. Where a regulatory measure imposes an abnormal burden on an individual property holder or a small group of property holders the state must pay compensation, even when the relevant statute did not provide for compensation. The courts in the different jurisdictions apply different criteria to determine whether the burden resulting from the regulatory state action was special and abnormal, with the effect that it becomes disproportionate and gives rise to a duty to pay compensation.<sup>2</sup>

An analysis of South African legislation reveals that the German law approach is not foreign to South African law. Several South African statutes do provide for equalisation-type measures, often monetary in nature, in the authorising statute. This chapter provides an overview of statutory examples that explicitly make provision for compensation. Furthermore, problematic regulatory measures that may be

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<sup>2</sup> See the discussion on the *égalité* principle in chapter 3.

constitutionally suspect are identified and possible developments of these measures are discussed. The discussion in this chapter is not a complete overview of South African legislation that provides or should provide some form of non-expropriatory compensation. The legislation discussed here is selected on the basis of examples that were considered by the courts. The aim of this chapter is to evaluate whether the German law approach to defer to the legislature is a viable method to adopt and develop in the South African law context. If the German approach is followed, otherwise legitimate and lawful regulatory state actions will be declared invalid if the authorising statute does not provide compensation or if the compensation provided for is insufficient to properly ameliorate the burden and thereby prevent it from being disproportionate and arbitrary.

In this regard, the next question is whether South African courts should be allowed to award compensation in instances where the authorising legislation does not provide compensation. Therefore, the question is whether something similar to the *égalité* principle in French, Dutch and Belgian law that allows courts to award non-expropriatory compensation even despite no legislative authority can be applicable in South African law. Moreover, it is considered how legislation that specifically excludes the possibility of compensation would affect the position if the French, Dutch and Belgian law approach is recognised in South African law. Lastly, the implication of the courts' power to award constitutional damages is considered. In this regard, it is considered whether the possibility of constitutional damages negates the courts' power to award compensation by means of statutory interpretation of the specific legislation itself in the absence of a compensation provision. Where compensation is granted in terms of legislation, it will not be compensation in terms of the Constitution (constitutional damages) but compensation that arises from statutory interpretation of the specific legislation itself. Furthermore, if it should prove

to be impossible to award compensation on the basis of statutory interpretation, the next question is whether an award of constitutional damages, in the absence of statutory authorisation to award compensation, will sufficiently ameliorate the harsh and excessive burden imposed by otherwise lawful and legitimate regulatory state action to prevent the deprivation from being arbitrary and consequently invalid.

## **2 Legislation that provides for non-expropriatory compensation**

### *2 1 Animal Diseases Act 35 of 1984<sup>3</sup>*

The Animal Diseases Act 35 of 1984 was enacted to, inter alia, promote animal health and control animal diseases. This is done by establishing control measures for any controlled purpose that is aimed at preventing the bringing into the Republic, or prevent or combat or control an outbreak or the spreading, or the eradication, of any animal disease.<sup>4</sup> Although the Act is a necessary and important regulatory measure that falls within the core function of the police power, namely protecting and promoting public health and safety, the consequences that flow from the Act may in some circumstances be excessive and disproportionate. The control measures may be extensive and result in a significant loss for the affected property owner.<sup>5</sup> For example, the Minister may prescribe control measures that restrict or control the slaughtering or hunting and the movement or removal of animals or things on, over, from or to land where a controlled animal disease or parasite occurs, or is suspected

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<sup>3</sup> This Act has been repealed by the Animal Health Act 7 of 2002, which has not yet been brought into operation. Therefore, I will base my discussion on the Animal Diseases Act 35 of 1984 as it is still in force.

<sup>4</sup> Section 1 defines these protective provisions as “controlled purposes”. See also section 9 which authorises the Minister of Agriculture (Minister) to prescribe general or particular control measures for any controlled purpose that may apply in respect of the whole of the Republic or in respect of a particular defined area.

<sup>5</sup> Section 9(2) sets out the scope of permissible control measures.

to be present.<sup>6</sup> The loss for a land owner who operates a slaughter house or a commercial hunting enterprise may be significant, especially if the restriction on slaughtering or hunting is extensive and has to be endured for a long period of time. Furthermore, the director of the Directorate of Animal Health of the Department of Agriculture (director) may, in terms of section 17 of the Act, seize animals that are infectious or contaminated or on reasonable grounds suspected of being infectious or contaminated; and destroy or otherwise dispose of or order the owner concerned to destroy or dispose of such animals.<sup>7</sup> Moreover, the carcass of any animal so seized, or slaughtered or destroyed or otherwise disposed of in terms of the Act shall be forfeited to the state.<sup>8</sup> The application of section 17 may single out an individual property owner to carry a burden in the interest of and for the benefit of the public as a whole, namely the slaughtering of a private owner's animals (infected or suspected to be infected) to prevent the spreading of diseases. Furthermore, the loss that may result from the seizure, slaughtering, destruction or disposal of the owner's animals may be excessive and it may be unfair to the particular owner to forfeit the carcass of such animal to the state without compensation. Therefore, the regulatory burden that results from section 17 may constitute an excessive loss that might amount to arbitrary deprivation of property under section 25(1) of the Constitution. As a result, the legislature made provision for compensation in certain circumstances, aimed to reduce the burden on the affected property owner.

Section 19 of the Act provides that an owner of any animal which has been destroyed or otherwise disposed of pursuant to any control measure, or any provision in terms of section 17(3) or (5), or any other provision in the Act, may submit an

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<sup>6</sup> Section 9(2)(c).

<sup>7</sup> Section 17(1) read with subsection (3).

<sup>8</sup> Section 17(5).

application for compensation for loss of the animal.<sup>9</sup> Furthermore, section 19(2) sets out factors that need to be considered by the director when determining the amount of compensation payable to the affected owner. Section 19(2) of the Act makes it clear that the amount of compensation must be a “fair amount”.<sup>10</sup> The factors that need to be taken into account include the amount statutorily prescribed for purposes of the section. When compensation is prescribed, it must be “based on a fair market value of the animal”.<sup>11</sup> However, in the absence of such statutorily prescribed amount, the National Executive Officer may determine the amount of compensation in accordance with any criterion he deems applicable. Other factors that must also be considered are the value of the animal or thing that has been returned to the owner; the amount that is due to the state by the owner pursuant to this Act in respect of the animal or thing; and the amount that may accrue to the owner in terms of any insurance. Furthermore, section 31 authorises the Minister to make regulations that prescribe any matter which is required or permitted to be prescribed in terms of the Act. Item 30 to the Regulations of the Act sets out how the amount of compensation should be determined.<sup>12</sup>

In *Minister of Agriculture and Another v Blueilliesbush Dairy Farming (Pty) Ltd and Another*<sup>13</sup> (*Blueilliesbush*) the Supreme Court of Appeal had to consider the basis upon which the amount of compensation for animals slaughtered under the Act was calculated. The case concerned an outbreak of bovine tuberculosis that occurred in the Eastern Cape. Due to the extremely contagious nature of the

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<sup>9</sup> Section 19(1).

<sup>10</sup> See also the interpretation of section 19(2) of the Act by the Supreme Court of Appeal in *Minister of Agriculture and Another v Blueilliesbush Dairy Farming (Pty) Ltd and Another* 2008 (5) SA 522 (SCA) para 8.

<sup>11</sup> See also *Minister of Agriculture and Another v Blueilliesbush Dairy Farming (Pty) Ltd and Another* 2008 (5) SA 522 (SCA) para 8.

<sup>12</sup> GNR 2026, GG 10469, 30 September 1986.

<sup>13</sup> 2008 (5) SA 522 (SCA).

disease, the Act mandates the slaughtering of animals that are suspected of carrying the disease. The respondents are part of a group of companies that run the largest dairy farming operations in the province, and the company involved was one of the largest in the country. Eight of the companies' farms were affected by the outbreak and more than 7 000 animals had to be slaughtered. The issue in this case was the interpretation of Item 30 of the Regulations, which provided that:

"When compensation is payable to a responsible person in terms of section 19 of the Act, the applicable compensation shall – (a) in the case of an infected animal, be 80 per cent of the fair market value thereof; (b) in the case of an animal killed for any controlled veterinary act or for the prevention of the spreading of a controlled animal disease, be 100 per cent of the fair market value thereof; ..."

The question before the Court was whether the value in Item 30(a) should be calculated in terms of the infected or the uninfected condition of the animal. The value of an animal in its uninfected condition was considerably higher than that of one in an infected condition.<sup>14</sup> The Court held that the Regulation's compensatory scheme retained coherence only if the value to which it referred was that of an uninfected animal.<sup>15</sup>

Regulation 30 has subsequently been amended and now only provides "[w]hen compensation is payable to a responsible person in terms of section 19 of the Act, the applicable compensation shall be determined by the director".<sup>16</sup> The amendment substituted the detailed procedural basis upon which the amount of compensation should be calculated with a general discretion exercised by the director to determine

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<sup>14</sup> In *Minister of Agriculture and Another v Blueilliesbush Dairy Farming (Pty) Ltd and Another* 2008 (5) SA 522 (SCA) paras 10-11 the Supreme Court of Appeal considered that the value of an infected animal was that of a slaughter animal (being the value of the usable parts of the slaughtered carcass), whereas the value of an uninfected animal was the fair market value of a productive dairy animal, which was about five times more than that of a slaughter animal.

<sup>15</sup> *Minister of Agriculture and Another v Blueilliesbush Dairy Farming (Pty) Ltd and Another* 2008 (5) SA 522 (SCA) paras 14, 18-19. See also the discussion of this decision in AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 281.

<sup>16</sup> GNR 558, GG 33234, 22 May 2009.



the amount of compensation. In light of the discussion of equalisation measures in German law in chapter 3, it seems unlikely that the substitution of the detailed criteria upon which compensation were to be determined in Regulation 30 with a broad and general discretion would satisfy the requirements for a valid equalisation measure. One of the requirements in German law for a valid equalisation measure is that, especially where the equalisation is monetary in nature, the legislature has to stipulate in detail the circumstances when a claimant is entitled to compensation and the grounds upon which the amount of compensation should be calculated.<sup>17</sup> The German Federal Constitutional Court regards an equalisation measure that does not fulfil the requirements for a valid equalisation measure as inappropriate and as failing in its purpose to equalise the disproportionate burden, with the effect that the regulatory state action is unconstitutional and should consequently be declared invalid.<sup>18</sup> However, although the South African courts have not yet considered the validity of the amended Regulation, if the validity of this provision as it now stands were to be challenged in a court, the outcome will not necessarily be the same as in German law. Notwithstanding the fact that the Act provides for compensation in certain specified circumstances (those instances specified by section 19), the amount of which is subject to the discretion of the director, if the amount of compensation is too low to adequately ameliorate the excessive and disproportionate burden imposed on the affected property holder, it can still be challenged for authorising an arbitrary deprivation of property under section 25(1) of the Constitution. Moreover, section 23 of the Act read with item 33 of the Regulations provide a procedural remedy, namely administrative review, which has to be exhausted before a claimant can challenge the constitutionality of the Act under section 25(1) of the Constitution.

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<sup>17</sup> *BVerfGE 100, 226 (1999) (Denkmalschutz)* para 102. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 276.

<sup>18</sup> See the discussion on equalisation measures in German law in chapter 3.

The Act sets out a procedure to review the director's determination of the amount of compensation. Section 23 provides a review procedure for persons who feel aggrieved by any decision taken by the director in terms of the Act. Furthermore, the determination of the amount of compensation constitutes administrative action, which is subject to review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).<sup>19</sup> If a claimant, after he has exhausted all the internal remedies under the Act, still feels aggrieved by the director's decision he can approach the courts for appropriate relief in terms of PAJA.

The compensation scheme provided for in section 19 is not compensation for expropriation since the state does not acquire any rights to the property affected by the Act.<sup>20</sup> Although the carcass of the animal destroyed or otherwise disposed of in terms of the Act is forfeited to the state, the Constitutional Court has repeatedly treated forfeiture as a regulatory deprivation and not expropriation of property.<sup>21</sup> Therefore, the statutory compensation provision in the Act is not compensation for expropriation. Instead, the compensation is aimed at softening the harsh and excessive effects that may result from a regulatory deprivation of property in terms of the state's police power. In this case, the regulatory burden imposed by the Act may, in certain circumstances, be disproportionate in the sense that the impact is excessive – it may result in total loss of property since the Act authorises the slaughtering or disposal of animals that are infectious or contaminated or suspected to be infectious or contaminated. Furthermore, the burden may also be disproportionate in the sense that it singles out individual property owners, such as

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<sup>19</sup> *Minister of Agriculture and Another v Blueilliesbush Dairy Farming (Pty) Ltd and Another* 2008 (5) SA 522 (SCA) para 7.

<sup>20</sup> In *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59, the Constitutional Court held that there can be no expropriation where deprivation does not result in property being acquired by the state. See the discussion of this decision in chapter 2.

<sup>21</sup> See the discussion on forfeiture below.

farmers, who have to bear this harsh burden that results from the Act in the interest of and for the benefit of the public as a whole. It would be unfair to expect the affected owners to endure the disproportionate regulatory burden without compensation. Therefore, the compensation provided for in the legislation is aimed at reducing the burden imposed on the affected property owners and thereby preventing the statute or action from being declared arbitrary and thus invalid in terms of section 25(1).<sup>22</sup>

## 2.2 National Water Act 36 of 1998

The purpose of the National Water Act 36 of 1998 is to “ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled”.<sup>23</sup> Furthermore, the promulgation of the Act forms part of the state’s compliance with its constitutional obligations to reform and bring about equitable access to all South Africa’s natural resources.<sup>24</sup> The Act abolished the traditional system of water rights, previously regulated by common law together with the Water Act 54 of 1956, and replaced it with a new regulatory framework.<sup>25</sup> Therefore, it is no longer possible to have private ownership of water.<sup>26</sup> In terms of the Act, one can

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<sup>22</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 282.

<sup>23</sup> Section 2.

<sup>24</sup> See section 25(4) and 25(8) of the Constitution. Section 27 of the Constitution provides that everyone has the right to have access to sufficient water and furthermore mandates that the state take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. See also the discussion of the Act in relation to transformative regime changes in AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 394-450.

<sup>25</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 398-399. Prior to the commencement of the Act it was possible to acquire and hold private property rights in water. However, the new Act abolished private ownership of water.

<sup>26</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 401 states that the Act abolished the traditional distinction between public and private water and, together with it, the notion of private ownership in water. The Act establishes a uniform system of regulated use rights with regard to all water, which is regarded and treated as public water.

only have use rights, which are acquired, allocated and enjoyed and subject to the regulatory control of the state.<sup>27</sup> Although there are policy arguments that justify this comprehensive regime change in respect to the regulation of water use,<sup>28</sup> the manner in which the change is implemented may offend against section 25 of the Constitution. In terms of the *FNB* methodology or logic, unless there is a formal expropriation present, the effects of the legislation on individuals should be assessed in terms of the non-arbitrariness requirement in section 25(1).<sup>29</sup> In terms of the *Agri SA* decision, state acquisition is a pre-requisite for expropriation to be present.<sup>30</sup> The Act does not transfer rights in water from previous holders to the state or others and its implementation can therefore not be regarded as expropriation of previously existing water rights.<sup>31</sup> Extrapolating from the *Agri SA* decision, the effect of the Act on previously held water rights is that of a deprivation of property. The impact of the new regulatory regime on individual property owners may arguably constitute arbitrary deprivation of property under section 25(1) since it abolished private ownership in water and replaced it with use rights that may be weaker and less valuable than those held in the previous dispensation.<sup>32</sup> It is therefore necessary to analyse the relevant provisions of the Act to establish whether it strikes an appropriate balance between the public interest served by the Act and the private interests of holders whose pre-existing water rights have been terminated or detrimentally affected by the commencement of the Act.

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<sup>27</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 401.

<sup>28</sup> According to AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 413, policy arguments that support the idea of a comprehensive regime change in respect of water resources include that water is a vital and scarce resource; there is a constitutionally recognised need for equal access to natural resources that were withheld or unequally distributed in the apartheid era; and the fact that conservation and equitable and sustainable use of this scarce resource is only possible in a system of comprehensive and strict state regulation.

<sup>29</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 421.

<sup>30</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

<sup>31</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 422. See also H Thompson *Water Law: A practical approach to resource management and the provision of services* (2006) 390.

<sup>32</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 411.

The National Government, acting through the Minister of Water Affairs and Forestry (Minister), is the public trustee of the nation's water resources.<sup>33</sup> The Minister has the power to regulate the use, flow and control of all water in the Republic.<sup>34</sup> Furthermore, the Minister must ensure that water is allocated equitably and used beneficially in the public interest.<sup>35</sup> Section 4 regulates entitlements to use water and states that a person may "use water in or from a water resource for purposes such as reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use, as set out in Schedule 1";<sup>36</sup> "continue with an existing lawful water use in accordance with section 34";<sup>37</sup> and "use water in terms of a general authorisation or licence under this Act".<sup>38</sup> More importantly, section 4(4) states that "[a]ny entitlement granted to a person by or under this act replaces any right to water which that person might otherwise have been able to enjoy or enforce under any other law".

Chapter 4 of the Act sets out general principles for regulating water use. Water use is broadly defined in section 21.<sup>39</sup> In terms of section 22 a person may only use water (a) without a licence if the water use is permissible under Schedule 1 if that water use is permissible as a continuation of an existing lawful use; or if that water is permissible in terms of a general authorisation issued under section 39; (b) if the water use is authorised by a licence under this Act; or (c) if the responsible authority

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<sup>33</sup> Section 3(1).

<sup>34</sup> Section 3(3).

<sup>35</sup> Section 3(2).

<sup>36</sup> Section 4(1). Section 1 defines water resource as "a watercourse, surface water, estuary, or aquifer".

<sup>37</sup> Section 4(2).

<sup>38</sup> Section 4(3).

<sup>39</sup> In terms of section 21, water use includes "taking and storing water, activities which reduce stream flow, waste discharges and disposals, controlled activities (activities which impact detrimentally on a water resource), altering a watercourse, removing water found underground for certain purposes, and recreation".

has dispensed with a licence requirement. Furthermore, authorised water use under section 22(1) is subject to the conditions and restrictions set out in section 22(2). Sections 32-35 regulate the continuation under certain conditions of an existing water use under the previous dispensation.<sup>40</sup> Although the Act recognises an existing lawful water use, it may only continue to the extent that it is not limited, prohibited or terminated by the Act.<sup>41</sup> Furthermore, no licence is required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence, in which case, if granted, such licence becomes the source of authority for the water use. However, if a licence is not granted the use is no longer permissible.

Sections 40-42 regulate the application procedure for licences to use water in terms of the Act.<sup>42</sup> Section 43 sets out the procedure to apply for a compulsory licence.<sup>43</sup> Furthermore, section 48 states that any licence issued pursuant to an application contemplated in section 43(1) replaces any existing lawful water use entitlement of that person in respect of the water in question. Sections 49-52 set out the procedures for review, amendment and renewal of licences and the substitution of their conditions. Section 49(4) provides that if an amendment of a licence condition

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<sup>40</sup> Section 32 defines an existing lawful water use as “a water use which has taken place at any time during a period of two years immediately before the date of commencement of this Act ... or ... which has been declared an existing lawful water use under section 33”. Section 33 sets out the instances when a responsible authority may declare a water use to be an existing lawful water use.

<sup>41</sup> Section 34 provides that a person, or that person’s successor-in-title, may continue with an existing lawful water use, subject to any existing conditions or obligations attached to that use; its replacement by a licence in terms of the Act; or any other limitation or prohibition by or under this Act.

<sup>42</sup> Water users who are not required to licence their use, but who wish to convert the use to licensed use may apply for a licence under section 40. However, section 40(4) provides that a responsible authority may decline to grant a licence when the applicant is entitled to the use of water under an existing lawful water use or by a general authorisation.

<sup>43</sup> In terms of section 43(1) the responsible authority may issue a notice requiring persons to apply for licences for one or more types of water uses contemplated in section 21. The procedure in section 43 is intended to be used in situations where areas are, or are soon to be, under “water stress”, or where it is necessary to review prevailing water use to achieve equity of access to water. Examples of “water stress” are when the demands for water are approaching or exceed the available supply; when water quality problems are imminent or already exist; or when the water resource quality is under threat.

on review severely prejudices the economic viability of any undertaking in respect of which the licence was issued, the claimant may lodge a claim for compensation under section 22(6).<sup>44</sup>

Section 22(6) states that

“[a]ny person who has applied for a licence in terms of section 43 in respect of an existing lawful water use as contemplated by section 32, and whose application has been refused or who has been granted a licence for a lesser use than the existing lawful water use, resulting in severe prejudice to the economic viability for an undertaking in respect of which the water was beneficially used, may, subject to subsections (7) and (8), claim compensation for any financial loss suffered in consequence”.<sup>45</sup>

Section 22(7) requires that the amount of compensation should be determined in accordance with section 25(3) of the Constitution, which prescribes how compensation for expropriation should be determined. According to section 22(10) of the Act, the responsible authority may enter into negotiations with the claimant and offer an allocation of water instead of compensation within 30 days after the decision of the Water Tribunal.<sup>46</sup>

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<sup>44</sup> The circumstances under which the relevant authority may amend existing licences in terms of section 49(2) are the following: (a) If it is necessary or desirable to prevent deterioration or further deterioration of the quality of the water resource; (b) if there is insufficient water in the water resource to accommodate all authorised water uses after allowing for the Reserve and international obligations; or (c) if it is necessary or desirable to accommodate demands brought about by changes in socio-economic circumstances, and it is in the public interest to meet those demands. However, section 49(3) limits the responsible authority's power in terms of section 49(2) by stating that such amendment may only be amended “if the conditions of other licences for similar water use from the same resource in the same vicinity” have also been amended in an equitable manner through a general review process. Section 49(5) requires that the responsible authority must afford the licensee an opportunity to be heard before amending any licence condition on review. It is interesting that the compensation measure provided for in section 22(6) is also applicable in section 49 amendments. A burden imposed by a regulatory scheme is generally disproportionate when it singles out an individual property holder to carry a burden which should generally be borne by the public as a whole. However, section 49(3) precludes this possibility by stating that an amendment must be applied in an equitable manner. Secondly, section 49 only applies in limited situations and only when there is a strong public interest in amending licence conditions.

<sup>45</sup> The procedure for claiming compensation and the determination of the amount of compensation payable are set out in section 22(7)-(10). See also the appeal to a High Court procedure set out in article 149.

<sup>46</sup> Section 146 establishes the Water Tribunal, which is an independent body that has jurisdiction to hear appeals against certain decisions made by a responsible authority or other authorised organs



The Act thus provides for compensation in certain instances in which the burden that results from the commencement of the Act may possibly be disproportionate. Although the Act applies to all holders of pre-existing rights, the burden that results from application of the Act may be more extensive for some individuals than for others, thereby rendering the burden disproportionate and excessive. The compensation provided for is not compensation for expropriation since the Act does not and is not intended to expropriate property.<sup>47</sup> The compensation provision in section 22(6) is focused on the financial loss an individual may suffer in terms of an unsuccessful application for a licence or amendment of a licence condition on review and not the loss of rights under the new regime.<sup>48</sup> This type of compensation is aimed at softening the excessive and inevitable loss that may result from the otherwise legitimate, necessary and lawful regulatory interference with property rights in terms of the Act. The compensation is therefore aimed at saving the legislative scheme from invalidity by ameliorating the burden that results from the Act, which might in the absence of compensation be found to constitute arbitrary deprivation of property in conflict with section 25(1) of the Constitution.

Such a change of the regulatory regime whereby a specific category of property is removed from the sphere of private ownership has also been upheld in foreign law. In the *Naßbauskiesung* decision the German Federal Constitutional Court held that the newly introduced regulatory water regime change did not abolish the core of property rights (the institution of property in terms of the institutional guarantee in article 14.1.1 of the Basic Law);<sup>49</sup> the right to use and dispose of property was not lost because it

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under the Act. Section 22(9) explicitly authorises the Water Tribunal to determine liability for compensation and the amount of compensation payable in terms of this section.

<sup>47</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 431.

<sup>48</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 430.

<sup>49</sup> See chapter 3 for a discussion on the institutional and the individual property guarantee in article 14 of the Basic Law.

was made subject to state approval.<sup>50</sup> The Federal Constitutional Court held that the institutional guarantee was not infringed when the state interfered with private property for the purpose of protecting and promoting the public interest.<sup>51</sup> Furthermore, the Court held that the constitutional guarantee of property does not guarantee the most beneficial and economically viable use of property or that the existing use of the property has to endure in perpetuity without any interference from the state.<sup>52</sup> However, although a regulatory interference may be in accordance to the institutional property guarantee, the impact that may result from the application of the Act may still be in conflict with the individual property guarantee, which protects individuals from disproportionate burdens. In *Naßauskiesung* the Court stated that a sudden regulatory regime change with regard to private ownership and existing entitlements to groundwater under the previous regime would have infringed upon the individual property guarantee in the Basic Law.<sup>53</sup> Therefore, the Court viewed the transitional arrangements provided for in the new Act necessary and important to equalise the burden, which would otherwise have been disproportionate. Transitional arrangements constitute one form of equalisation measures. Subsequently, in the *Denkmalschutz* decision the Federal Constitutional Court considered the various forms of equalisation measures and held that monetary compensation should only be used as a last resort.<sup>54</sup> In the context of South African law, invalidation of the new Water Act would create a lacuna in the area of water conservation and management, which is necessary and important for the promotion and protection of the public interest in light of the scarcity of water as a natural resource. Therefore, the non-

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<sup>50</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*) 345.

<sup>51</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*) 339. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 259.

<sup>52</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*) 345, 350-351. See also DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 261.

<sup>53</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*) 349.

<sup>54</sup> BVerfGE 100, 226 (1999) (*Denkmalschutz*) para 96

expropriatory compensation provision in the Act fulfils an extremely important function.

### 2 3 *Road planning, town-planning and land use planning ordinances*

The purpose of road planning legislation is to regulate the powers of the state with reference to the proclamation, establishment and definition of public roads over land within the jurisdiction of local authorities. Section 67 of the Local Government Ordinance 17 of 1939 regulates the instances when the local authority may permanently close or divert any street or portion of a street.<sup>55</sup> Any person adversely affected by the proposed closing or diversion may lodge an objection with the local authority for any loss or damages that will be sustained by him if the proposed closing or diversion is carried out.<sup>56</sup> The local authority may choose to proceed with its proposed plan and pay compensation for the damage or loss sustained by such person; or may resolve not to proceed if the local authority finds that the payment of compensation will be too costly.

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<sup>55</sup> This Ordinance is applicable in Gauteng, Limpopo and Mpumalanga. Section 67 of the Ordinance provides

“(a) Any person who considers that his interests will be adversely affected by the proposed closing or diversion may at any time before the time for the lodging of objections and claims has expired, lodge with the council a claim, in writing, for any loss or damage which will be sustained by him if the proposed closing or diversion is carried out. If such closing or diversion is carried out the council shall pay compensation for the damage or loss sustained by such person, the amount of compensation in default of mutual agreement to be determined by arbitration. In assessing the amount of compensation the benefit or advantage derived or to be derived by the claimant by reason of the closing or diversion shall be taken into account. ...

(b) If the council finds that the payment of compensation will be too costly, it may resolve not to proceed with the proposed closing or diversion.”

A similar provision is found in section 30 of the Local Government Roads Ordinance 44 of 1904.

<sup>56</sup> Section 67(4)(a).

In *City of Johannesburg v Engen Petroleum Ltd and Another*,<sup>57</sup> the first respondent (Engen) claimed compensation in terms of section 67 from the appellant (the City) for damages that resulted from a diversion of a busy thoroughfare that impeded access by vehicles to the filling station owned by the respondent. The public road concerned in this case (Grayston Drive in Sandton, Johannesburg) was a major thoroughfare that leads to and from on- and off-ramps of the highway, which connects Pretoria and Johannesburg. From 1992-1994 the City effected substantial changes to Grayston Drive, particularly at its intersection with Katherine street, which was also a major thoroughfare. The effect of the construction was to elevate four lanes of Grayston Drive above Katherine street in order to create a flyover above the latter. The remaining lanes remained on the same plane as previously. The second respondent (Sandton Gate Service Station CC, hereafter Sandton Gate) owned a petrol filling station and a public garage where Grayston Drive intersected with Katherine street. Engen supplied petrol and other products to Sandton Gate. The respondents alleged that the diversion or closure of the lanes in Grayston Drive impeded access of vehicles to the filling station and thereby led to a decrease in the respondents' respective incomes. As a result they claimed compensation in terms of section 67(3) and (4) of the Ordinance.

The issue before the Supreme Court of Appeal was whether the elevation of four lanes, which created a flyover, amounted to a permanent diversion or closure of Grayston Drive for purposes of section 67 of the Ordinance.<sup>58</sup> The respondents would only fall within the ambit of section 67, and thereby be entitled to claim compensation, if the answer to this question was affirmative. The court a quo held

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<sup>57</sup> 2009 (4) SA 412 (SCA).

<sup>58</sup> The appellant in *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 8 relied on the judgment in *Bellevue Motors CC v Johannesburg City Council* 1994 (4) SA 339 (W), in which it was held that changing the direction of the flow of traffic did not constitute a diversion for purposes of section 67 of the Ordinance.

that prior to the construction of the flyover, the three lanes of Grayston Drive were on a level plane but after the construction two of the lanes were located on a different plane and diverted away from the intersection of Katherine Street.<sup>59</sup> Therefore, the court a quo concluded that there was a permanent diversion for purposes of section 67 of the Ordinance. The Supreme Court of Appeal confirmed the court a quo's decision and stated that the question whether there was a diversion or not was dependent on the facts and not determined by the Surveyor-General or any other functionary.<sup>60</sup>

According to the Court, the purpose of section 67 was to compensate for the pecuniary loss sustained as a result of a change to the road that caused an adverse financial impact upon owners, lessees or occupiers whose property abuts the road.<sup>61</sup> The Court had to determine whether the change to Grayston Drive had such an adverse financial effect on the respondents, in which case they would be entitled to compensation in terms of the Ordinance. The Court considered that the elevation of the lanes on Grayston Drive had an adverse impact on the ability of drivers to gain access to the filling station, regardless of the direction in which they were travelling.<sup>62</sup> Furthermore, the elevation of the lanes to a different plane also altered access to and from adjoining properties.<sup>63</sup> According to the Court this was exactly the kind of road change that affects adjacent landowners, lessees and occupiers whom the provisions of the Ordinance are designed to compensate in the event of loss.<sup>64</sup> Therefore, the

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<sup>59</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 9.

<sup>60</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 14.

<sup>61</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 15.

<sup>62</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 16.

<sup>63</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 16.

<sup>64</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 17.

Court concluded that the construction of the flyover did constitute a permanent diversion and that the respondents were therefore entitled to compensation.<sup>65</sup>

This compensation provided for in the Ordinance is not compensation for expropriation or compensation in terms of the law of delict. The Ordinance did not expropriate the respondents' property (land or any entitlements connected to ownership of property). Furthermore, delictual damages is only applicable if the loss is the direct result of an unlawful action.<sup>66</sup> In this case the state did not act unlawfully. The Ordinance authorises the state to permanently close or divert roads when commencing construction work to the relevant public road. Therefore the financial loss suffered by the respondents in this case was the result of a lawful state action. Section 25(1) of the Constitution authorises the state to limit property rights in the public interest. Compensation is not a requirement for a valid deprivation of property. However, a law may not authorise arbitrary deprivation of property.<sup>67</sup> Although road planning is in the public interest, it is unfair to enact legislation that has the effect of expecting an individual property owner to bear an excessive burden for the benefit of the public as a whole without compensation. In this case, the compensation provided for in section 67 of the Ordinance is aimed at reducing the burden on the respondents to prevent the burden from being disproportionate and therefore arbitrary for purposes of section 25(1) of the Constitution. Furthermore, section 67 of the Ordinance does not guarantee full compensation for the loss suffered by the respondents. The section specifically provides that any benefit or advantage derived or to be derived by a claimant will be taken into account when assessing the amount

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<sup>65</sup> *City of Johannesburg v Engen Petroleum Ltd and Another* 2009 (4) SA 412 (SCA) para 18.

<sup>66</sup> J Neethling; JM Potgieter & JC Knobel *Neethling-Potgieter-Visser Law of delict* (6<sup>th</sup> ed 2010) 4 state that a delict "is the act of a person that in a wrongful and culpable way causes harm to another". Furthermore, all five elements of delict must be present before the conduct complained of may be classified as a delict. These five elements include an act, wrongfulness, fault, causation and harm.

<sup>67</sup> See chapter 1 for a discussion on arbitrary deprivation of property.

of compensation payable. The compensation in this case fulfils the same function as financial equalisation payments in German law and statutory non-expropriation compensation in terms of the *égalité* principle in French, Dutch and Belgian law.

### **3 Legislation that specifically excludes the possibility of compensation**

#### *3 1 Firearms Control Act 60 of 2000*

The Firearms Control Act 60 of 2000 provides for compensation under some circumstances but specifically excludes the possibility of compensation in other specific instances. However, the classification of the kind of compensation provided for in the Act is problematic. It is not clear whether the compensation scheme provided for in the Act is intended to be a form of non-expropriatory equalisation compensation or whether it is intended to be compensation for expropriation.

The Firearms Control Act fulfils a public purpose that falls within the core of the police power, namely protecting and promoting public safety. The Act regulates the possession of firearms and prohibits the possession of a firearm without a licence or permit issued in terms of the Act.<sup>68</sup> Furthermore, the Act aims to improve the control of legally possessed firearms. Sections 13-15 restrict the number of licences a person may hold in respect of certain types of firearms.

The current Act repealed and replaced the Arms and Ammunitions Act 75 of 1969 (old Act). To accommodate those who held firearm licences under the old Act, a transitional scheme is included in the new Act. Schedule 1 of the new Act provides

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<sup>68</sup> Section 3.



that a licence granted under the old Act is valid for five years from the date of the commencement of the new Act.<sup>69</sup> During this five year period, a person holding a licence issued in terms of the old Act must apply for the corresponding licence or permit in terms of the new Act.<sup>70</sup> If the application for the renewal of a licence is rejected or otherwise terminated, the former holder of the licence must, within 60 days of receipt of notice, dispose of the firearm through a dealer or in such manner as the Registrar of Firearms (Registrar) may determine.<sup>71</sup> If the firearm is not disposed of within this 60 day period, it is forfeited to the state and the former holder of the licence must surrender it immediately at such place and in such manner as the Registrar may determine.<sup>72</sup> A person who fails to comply with the provisions of the Act is guilty of an offence.<sup>73</sup>

The commencement of the new Act created the situation that persons who lawfully possessed firearms under the old Act and who were unable to secure a licence in terms of the new Act, had to sell or donate the firearm to another qualified person; or deactivate the firearm; or destroy the firearm; or surrender the firearm to the state.<sup>74</sup> The possibility of this regulatory burden having harsh effects in certain instances was foreseeable and therefore the legislature included a compensation scheme in the Act to reduce the possible burden on individual firearm owners.

Chapter 19 of the Act regulates the situations where compensation is payable. Section 137 provides for compensation to persons whose firearms have been

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<sup>69</sup> Item 1(1) of Schedule 1.

<sup>70</sup> Item 11(1)(a) of Schedule 1.

<sup>71</sup> Section 28(4)(b). Section 1 read with section 123 states that the National Commissioner of the South African Police Service is the Registrar of firearms.

<sup>72</sup> Section 28(5).

<sup>73</sup> Section 120(1)(a). In terms of section 121 read with Schedule 4 to the new Act, the penalty for non-compliance with section 28 is imprisonment for a maximum period of 10 years.

<sup>74</sup> *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012).

surrendered or forfeited to the state in circumstances other than those referred to in sections 134-136.<sup>75</sup> For example, section 149(2) provides that firearms and ammunition forfeited to the state must be destroyed but in terms of section 149(3), the state may retain and become owner of any forfeited firearm or ammunition, which the Registrar deems to be of special value. The previous owner of the relevant firearm or ammunition may in this situation claim compensation in terms of the Act.<sup>76</sup>

The Minister must, in terms of section 137(5), establish guidelines for the payment of compensation. In terms of the guidelines enacted under the Act,<sup>77</sup> an application for compensation will be considered by a panel of at least three independent valuers. The valuation determined by the panel is subject to the flat rate and maximum amount of compensation set out in the guidelines for the relevant category of firearm. Furthermore, the guidelines also set out the maximum amount of compensation payable for any firearm, irrespective of the evaluation by the panel. Section 137(7) states that an aggrieved person who is not satisfied with the amount of compensation may approach a court to determine the amount, the time and the manner of payment of the compensation.

It is not clear whether the compensation provided for by the Act is similar to the non-expropriatory compensation discussed above or whether the compensation is meant to be compensation for expropriation. On first glance the compensation seems to be compensation for expropriation, especially since the state acquires ownership of the forfeited firearm or ammunition in the instances when the Registrar deems such firearm or ammunition to be of special value. However, to view these situations as expropriation is problematic because the Act uses the term “forfeiture”.

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<sup>75</sup> See a discussion of sections 134-136 below.

<sup>76</sup> Section 149(3)(c).

<sup>77</sup> See GN 1071, GG 32701, 10 November 2009 for the guidelines promulgated by the Minister in compliance with section 137(5).

The exercise of the state power of forfeiture of property should be treated as deprivation of property that has to comply with the requirements in section 25(1) of the Constitution.<sup>78</sup> Van der Walt points out that the effects of forfeiture may appear expropriatory in the sense that the state sometimes acquires the property and benefits from its acquisition financially.<sup>79</sup> The Constitutional Court's statement in the *Agri SA* decision that acquisition is a fixed requirement for expropriation may create further confusion and lead to the assumption that forfeiture amounts to expropriation.<sup>80</sup> However, this assumption is problematic since one of the requirements for a valid expropriation is the payment of compensation and the public purpose sought to be achieved by forfeiture will be defeated if compensation were required for it. Van der Walt warns that state acquisition cannot be regarded as the single defining characteristic of expropriation, particularly for the confusion this may create in relation to forfeiture.<sup>81</sup> Van der Walt argues that a more appropriate approach to distinguish between deprivation and expropriation is to determine the state's intention with which the infringement was made.<sup>82</sup> Moreover, the Constitutional Court has consistently treated forfeiture as deprivation and not expropriation of property.<sup>83</sup> Van der Walt states that forfeiture is a regulatory action

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<sup>78</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 311-312.

<sup>79</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 320.

<sup>80</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59. See the discussion on the distinction between deprivation and expropriation in chapter 2.

<sup>81</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 200; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 338; AJ van der Walt & H Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *South African Public Law* 17-41 at 21. See also H Mostert "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *South African Journal on Human Rights* 567-592 at 573, 577. Moreover, in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 78, 102 Cameron J and Froneman J in separate minority judgments both disagreed with the majority judgment on the requirement of state acquisition as a pre-requisite for expropriation.

<sup>82</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 200.

<sup>83</sup> See *Van der Burg and Another v National Director of Public Prosecutions and Another* 2012 (2) SACR 331 (CC) paras 25, 28; *Mohunram and Another v National Director of Public Prosecutions and Another* (Law Review Project as Amicus Curiae) 2007 (4) SA 222 (CC) paras 44, 56-102; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) paras 58-69.

that involves deprivation of property, which is usually reasonably easy to justify in terms of the police power principle in so far as individual instances of forfeiture are aimed at and necessary for the protection of public health and safety.<sup>84</sup> The reasons for the deprivation in terms of the new Firearms Control Act relate to the fact that possession of the property (firearm) is illegal or dangerous. Moreover, section 149(2) expressly states that a firearm that has been forfeited in terms of the Act remains the property of the owner thereof until its destruction; in that sense, the state does not acquire the property but regulates its destruction. Therefore, although the state apparently acquires possession of the firearm, it does not acquire title thereof. Forfeiture for purposes of this Act is clearly not expropriation of property.

The compensation scheme in sections 137 and 149 of the Act appears to authorise compensation for expropriation rather than the regulatory type of compensation referred to above. A firearm only becomes the property of the state once it elects to retain the firearms in terms of section 149(3). In all other instances, the firearm, although it is in the possession of the state, remains the property of the owner thereof until its destruction.<sup>85</sup> Section 149(3) authorises the acquisition of title of the firearm by the state. However, as was argued above, acquisition should not be regarded as the sole determining factor to distinguish between deprivation and expropriation of property; one should also have regard to the intention with which the infringement was made. The state's decision to retain or to destroy a firearm is qualified. Only firearms that are deemed to be of special value may be retained by the state. This qualification in section 149(3) indicates that the purpose of the infringement is no longer purely to promote and protect the public's safety but rather to preserve a firearm, which may for instance be of historical significance or a

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<sup>84</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 312.

<sup>85</sup> Section 149(2).

technologically advanced object. Depending on the reason why special value is attached to a particular firearm, the retention rather than destruction thereof may be for a public purpose or in the public interest. The purpose of the infringement therefore seems to move away from a regulatory limitation imposed on the use and enjoyment of property in terms of the police power to that of eminent domain. If this is the case, it would be unfair not to compensate an owner who sacrifices his property for the benefit of the public as a whole. If this argument is correct, the exclusion of compensation for a firearm retained by the state in terms of section 149(3) that has been surrendered rather than forfeited would amount to expropriation without compensation, which may be in conflict with section 25(2).

Although the Firearms Control Act allows for compensation in some instances, it is not clear what type of compensation the Act envisages. The Firearms Control Act is one example of legislation that specifically excludes the possibility of compensation in specified circumstances. In terms of the Act, compensation is not due in situations where firearms or ammunition are forfeited to the state in terms of section 134. Firearms or ammunition can be forfeited to the state in terms of the Act for various reasons, including if the holder of the firearm had contravened or not complied with a provision of the Act or a condition specified in that licence; or if the holder of the licence was or became unfit to possess a firearm in terms of the Act.<sup>86</sup> Other instances in terms of the Act where the duty to compensate does not arise are when firearms and ammunition are seized by the state;<sup>87</sup> or where firearms and ammunition are destroyed by the state.<sup>88</sup> Similar to the forfeiture example discussed above, the state's power to search and seize illegally possessed, dangerous property should be treated as deprivation of property in terms of section 25(1) and not as

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<sup>86</sup> Section 134(a)-(b).

<sup>87</sup> Section 135.

<sup>88</sup> Section 136.

expropriation of property.<sup>89</sup> Section 136 of the Act provides that the Registrar may issue a notice in the *Gazette* stating that any firearm or ammunition seized, surrendered or forfeited to the state shall be destroyed.<sup>90</sup> Any person who has a valid claim to the relevant firearm or ammunition may make representations to the Registrar as to why the particular property should not be destroyed.<sup>91</sup> If the Registrar, after considering the representations in terms of section 136(2), is not satisfied that a valid claim has been proven, the firearm or ammunition may be destroyed and no compensation will be payable.<sup>92</sup>

In *Justice Alliance of South African and Another v National Minister of Safety and Security and Others*<sup>93</sup> the Supreme Court of Appeal had to consider whether persons who voluntarily surrendered their firearms in terms of section 136 were entitled to compensation if the firearms were destroyed by the state. The Court drew a distinction between compulsory surrender and voluntary surrender of firearms.<sup>94</sup> In terms of the new Act, a former holder of a firearm would have to surrender his firearm to the state in the following situations: The cancellation of accreditation;<sup>95</sup> the termination of a firearm licence;<sup>96</sup> the cancellation of a dealer's licence;<sup>97</sup> the cancellation of a manufacturer's licence;<sup>98</sup> or when a person is declared unfit to

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<sup>89</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 311-312.

<sup>90</sup> Section 136(1).

<sup>91</sup> Section 136(2).

<sup>92</sup> Section 136(3).

<sup>93</sup> [2012] ZASCA 190 (30 November 2012). This was an appeal from an unreported judgement of the Western Cape High Court cited as *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* Case No 11206/2008.

<sup>94</sup> *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012) para 14.

<sup>95</sup> Section 8(5).

<sup>96</sup> Section 28(5).

<sup>97</sup> Section 42(5).

<sup>98</sup> Section 56(5).

possess a firearm.<sup>99</sup> According to the Court, these situations constituted compulsory surrender of firearms. The Court held that section 136 of the Act clearly and expressly excluded the possibility of compensation for firearms destroyed by the state, irrespective whether it was compulsorily or voluntarily surrendered.<sup>100</sup> Moreover, section 149(3) recognises that when the state retains a firearm, which is deemed to be of special value, that firearm becomes the property of the state and the former owner should be compensated.<sup>101</sup> Section 149(2) provides that firearms or ammunition forfeited to the state remains the property of the owner thereof until its destruction. The Court concluded that to read compensation into section 136 would unduly strain the language of the legislation and would be a deliberate disregard of the explicit provisions of the Act.<sup>102</sup>

The forfeiture, seizure or surrender of firearms and ammunition in instances other than those specified in sections 137 and 149 should be construed as deprivation of property. The Act applies to all holders of firearms equally, therefore in this regard cannot constitute a disproportionate burden because it affects everyone in the same way. However, in the alternative, the legislature's explicit exclusion of compensation in these circumstances does not in itself bar a claimant from challenging the constitutionality of an infringement of his property. If the court finds that a provision in the Act authorises arbitrary deprivation of property, the court will most probably declare the relevant provision invalid. In *Justice Alliance of South*

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<sup>99</sup> Section 104(2).

<sup>100</sup> *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012) paras 15-16.

<sup>101</sup> *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012) para 17.

<sup>102</sup> *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012) para 17.



*African and Another v National Minister of Safety and Security and Others*<sup>103</sup> the Supreme Court of Appeal held that it cannot award compensation since the legislature has explicitly excluded the possibility of compensation. An express statutory exclusion of compensation indicates to the court that the legislature had foreseen the possible deprivation that might result in the exercise of the Act and still deemed that compensation should not be applicable. Whether this will have any impact on the Court's power to award constitutional damages in terms of sections 38 and 172 of the Constitution is unclear.<sup>104</sup>

## **4 Legislation that might require but does not provide for equalisation-type measures**

### *4 1 Electronic Communications Act 36 of 2005*

The Electronic Communications Act 36 of 2005 is aimed at regulating electronic communications in the Republic in the public interest.<sup>105</sup> Chapter 4 of the Act is only applicable to electronic communications network service licensees (licensee) and relates to the establishment and maintenance of electronic communications networks and electronic communications facilities. Licensees are not limited to state organs but include private parties that mainly have profit as a motive.<sup>106</sup> Section 21 mandates the Minister to provide guidelines, which must provide processes and procedures for, amongst others, resolving disputes that may arise between a licensee and any land

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<sup>103</sup> [2012] ZASCA 190 (30 November 2012). This was an appeal from an unreported judgement of the Western Cape High Court cited as *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* Case No 11206/2008.

<sup>104</sup> See the discussion of constitutional damages below.

<sup>105</sup> Section 2 sets out various public purposes that the Act aims to achieve.

<sup>106</sup> *SMI Trading CC v Mobile Telephone Networks (Pty) Ltd and Others* 2012 (2) SA 642 (GSJ) para 27.

owner. However, no such guidelines have yet been enacted. Furthermore, section 22(1) allows a licensee to enter upon any land to construct, maintain or remove an electronic communications network or facilities and may for that purpose attach wires or any other support to any building or other structures. Furthermore, section 22(2) provides that any actions authorised in terms of section 22(1) are subject to compliance with applicable law and the environmental policy of the Republic.

In *Mobile Telephone Networks (Pty) Ltd v SMI Trading*<sup>107</sup> (*SMI Trading*) the Supreme Court of Appeal considered whether section 22 of the Act was in conflict with section 25 of the Constitution. The court a quo ordered the appellant (MTN) to remove its base station from the private property of the respondent (SMI). MTN had concluded a lease agreement for a period of approximately ten years with the previous owner of the property in question. In terms of the agreement, MTN was entitled to construct and maintain a base station on the property and was obliged to pay the lessor a fixed monthly rental with provision for escalation. The lease agreement expressly stated that the base station was “movable”, implying that it would be removed on termination of the lease. When the lease agreement expired MTN took no steps to renew it. Two months after the lease agreement had expired SMI became the registered owner of the property. Subsequent to the transfer, MTN proposed a new lease agreement with SMI. However, the parties could not reach an agreement on the terms of the new lease, which led to SMI requesting the removal of the base station.

MTN argued that section 22 created a statutory servitude in favour of electronic communications network licensees that did not have to be registered and that lasted in perpetuity. The parties agreed that MTN’s actions in terms of its interpretation of

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<sup>107</sup> 2012 (6) SA 638 (SCA).

the Act did not amount to expropriation but constituted deprivation of property.<sup>108</sup> However, the regulation of property to protect the common good must not amount to arbitrary deprivation as meant by section 25(1) of the Constitution.<sup>109</sup> SMI did not challenge the constitutionality of section 22 of the Act but argued that MTN's reliance on section 22 was misconceived because the manner in which it invoked section 22 amounted to an arbitrary deprivation of property in violation of section 25 of the Constitution.<sup>110</sup>

The Court held that after the expiry of the lease MTN had unilaterally held over and remained in occupation of SMI's property.<sup>111</sup> The Court held that although section 22 is concerned with the exercise of public power, it does not authorise the arbitrary deprivation of property. Furthermore, there is no evidence that the object of the Act cannot be achieved without depriving the respondent of its property in that way.<sup>112</sup> In the end the Court concluded that section 22 does not confer upon a licensee the power to unilaterally occupy private property for purposes of the section.<sup>113</sup>

The Court emphasised another ground why the appeal could not succeed. The Court held that any decision by MTN in terms of section 22 of the Act is administrative action, which is reviewable under PAJA.<sup>114</sup> Furthermore, any administrative action which adversely affects the rights or legitimate expectation of

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<sup>108</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 17.

<sup>109</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 18.

<sup>110</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 17.

<sup>111</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 21.

<sup>112</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 21.

<sup>113</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 21. See also the discussion of this decision in AJ van der Walt "Constitutional property law" 2012 *Annual Survey of South African Law* 182-199.

<sup>114</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 19.

any person must be procedurally fair.<sup>115</sup> Therefore, the taking of the decision must be procedurally fair.<sup>116</sup> However, the Court pointed out that MTN's original entry upon the site, its construction and maintenance of the basis station took place pursuant to a commercial lease and did not amount to administrative action, since section 22 only came into operation thereafter.<sup>117</sup> Judicial review under PAJA is only possible if a "decision" constitutes administrative action in terms of section 1 of PAJA. Therefore, in the absence of a "decision" taken in a lawful, reasonable and procedurally fair manner, the Court concluded that MTN had no right to occupy SMI's property.<sup>118</sup> However, administrative action in terms of PAJA can sometimes also constitute procedurally arbitrary deprivation of property under section 25(1) of the Constitution. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>119</sup> (FNB) the Constitutional Court distinguished between two forms of arbitrary deprivation of property, namely substantive and procedural arbitrariness. Van der Walt points out that the *SMI Trading* decision is a good illustration of a deprivation that might have been procedurally arbitrary in terms of section 25(1).<sup>120</sup> Uncertainty exists with regard to the interplay between procedurally arbitrary deprivation of property in terms of section 25(1) and procedurally unfair administrative action in terms of PAJA. Van der Walt argues that to give proper effect to PAJA, decisions based on section 25(1) should be reserved for deprivations that are either substantively arbitrary (irrespective whether they constitute administrative action) or that are procedurally arbitrary but not brought about by administrative

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<sup>115</sup> Section 3(2)(b) of PAJA.

<sup>116</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 19.

<sup>117</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 22.

<sup>118</sup> *Mobile Telephone Networks (Pty) Ltd v SMI Trading* 2012 (6) SA 638 (SCA) para 22.

<sup>119</sup> 2002 (4) SA 768 (CC) para 100.

<sup>120</sup> AJ van der Walt "Constitutional property law" 2012 *Annual Survey of South African Law* 182-199 at 188.

action.<sup>121</sup> Therefore, procedurally arbitrary deprivations of property in terms of section 25(1) that are also procedurally unfair administrative actions in terms of PAJA should be dealt with under PAJA and not under section 25(1). It is not clear from the decision whether the Court considered MTN's actions as effecting a substantive or procedurally arbitrary deprivation of property.<sup>122</sup> However, Van der Walt points out that this distinction could have been avoided altogether.<sup>123</sup> The basis for the decision could simply have been that section 22 does not authorise the unilateral occupation of private property without an underlying legal right (such as a lease or servitude) for purposes of the Act because the section is capable of a construction that does not require such arbitrary powers for licensees.<sup>124</sup>

The Act furthermore provides in section 28 that the licensee may take such steps as he deems necessary to give relief to an owner of private land who can satisfactorily prove that he is obstructed in the free use of his land because of the insufficient height or depth of any electronic communications network or facility.<sup>125</sup> The section does not provide a review procedure for an aggrieved property owner, it merely states that the licensee, in taking any action in terms of this section, must have due regard for the environmental laws of the Republic. The decision taken by the licensee will probably constitute administrative action and can therefore be reviewed under PAJA. The outcome of such a review will most probably be either a finding that the licensee's action was procedurally unfair and therefore invalid, in

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<sup>121</sup> AJ van der Walt "Constitutional property law" 2012 *Annual Survey of South African Law* 182-199 at 188. See also AJ van der Walt "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94.

<sup>122</sup> AJ van der Walt "Constitutional property law" 2012 *Annual Survey of South African Law* 182-199 at 188.

<sup>123</sup> AJ van der Walt "Constitutional property law" 2012 *Annual Survey of South African Law* 182-199 at 189.

<sup>124</sup> AJ van der Walt "Constitutional property law" 2012 *Annual Survey of South African Law* 182-199 at 189.

<sup>125</sup> Section 28(2).

which case a remedy in terms of PAJA will be awarded, or a finding that its actions were procedurally fair and therefore valid.

The Act does not intend to expropriate private property but merely regulates the use and enjoyment of property in the public interest. The burden that results from the exercise of powers granted under the Act may in some situations be unfair and disproportionate. The Act singles out individual property owners and requires of them to tolerate a licensee entering the owner's private property to build and maintain electronic communications networks or facilities, which in effect deprives such an owner of the use and enjoyment of a sometimes sizable portion of his land for the benefit of the public as a whole. Furthermore, although the communications network or facilities hinder the landowner's free use of his land, it may sometimes render a portion of the landowner's land useless, for example if the height or depth of a particular communications network or facility is too close to the surface that the landowner cannot make economical use of the affected land and it would be unreasonable or too costly for the licensee to move the particular communications network or facility. Although the Act grants a broad discretion to the licensee regarding appropriate relief, the Act does not provide guidelines in the Act itself or its Regulations regarding what the relief should entail. If a property owner can successfully prove that he was arbitrarily deprived of his property in terms of the Act, the relevant provision will be declared invalid. Invalidity can in suitable cases be avoided by providing a compensation scheme in the Act, stipulating the circumstances in which compensation should be paid and how the amount of compensation should be calculated. This would soften the burden on property owners and prevent the regulatory limitation from constituting arbitrary deprivation of property.

## 4.2 National Heritage Act 25 of 1999

The overarching objectives of the National Heritage Act 25 of 1999 include the identification, protection, preservation and management of heritage resources for purposes of public prosperity, spiritual well-being and cultural identity.<sup>126</sup> The Act contains various provisions that seek to achieve these objectives. One such provision is section 34, which limits an owner's right to demolish any structure or part of a structure which is older than 60 years without a permit. Strydom argues that although section 34 has not been challenged on constitutional grounds, it is likely that there may be circumstances where the preservation of a historic building may impose a disproportionate burden upon the landowner.<sup>127</sup> According to Strydom, a similar situation may arise as in the German Monument Protection Act of the Rhineland-Palatinate that was considered in the *Denkmalschutz* decision<sup>128</sup> where the heritage authority refused to issue a demolition permit for a decaying historical building, thereby making it impossible for the owner to use what has become an expensive building to maintain.<sup>129</sup> With regard to the German example, Strydom argues that the Heritage Resources Act could result in a similar situation, for example if the authorities should refuse to grant the landowner a demolition order for a historical building that has no economically viable use to the owner and is too costly to restore and maintain.<sup>130</sup> Furthermore, this could result in a situation where the owner finds it

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<sup>126</sup> *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and Another* 2008 (3) SA 160 (SCA) para 10. See also the preamble of the National Heritage Act 25 of 1999. For an analysis of the constitutional impact of the National Heritage Act on property rights, see J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012).

<sup>127</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 318.

<sup>128</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 322. See chapter 3 for a discussion of the *Denkmalschutz* decision.

<sup>129</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 322.

<sup>130</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 322.



increasingly difficult to sell or lease the building in its dilapidated state.<sup>131</sup> Strydom convincingly argues that equalisation measures should be provided for in the Act to prevent it from being declared invalid for arbitrarily depriving owners of their property.<sup>132</sup> She argues that the equalisation measures need not be monetary but can include tax breaks or subsidies; providing legislative authorisation to charge members of the public entry fees; or creating exemptions from applicable zoning regulations.<sup>133</sup>

#### 4.3 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)*

One aim of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is to regulate the eviction of unlawful occupiers. PIE is enacted to give effect to a direct constitutional obligation in section 26(3) of the Constitution.<sup>134</sup> The preamble states that “no one may be deprived of their property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. Furthermore, “no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant

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<sup>131</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 322.

<sup>132</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 332-333.

<sup>133</sup> J Strydom *A hundred years of demolition orders: A constitutional analysis* (2012) 329.

<sup>134</sup> Section 26(3) provides that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”. Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 17 stated that “[s]ection 26(3) evinces special constitutional regard for a person’s place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security”.

circumstances". It is evident in the preamble that PIE aims to balance the tension between the interests of property owners and the interests of unlawful occupiers.<sup>135</sup>

In *Port Elizabeth Municipality v Various Occupiers*<sup>136</sup> (*PE Municipality*) the Constitutional Court emphasised that the Constitution recognises that land rights, the right of access to adequate housing and the right not to be arbitrarily evicted are closely entwined. Furthermore, the Court held that the Constitution imposes new obligations on the courts regarding the tension between property rights (section 25) and housing rights (section 26).<sup>137</sup> The Court stated that the judicial function in this respect is not to establish a hierarchy between these two conflicting fundamental rights but rather to "balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case".<sup>138</sup>

PIE provides some guidelines to courts in determining the approach to eviction required under the Constitution. Section 4 of PIE applies to the application by an owner or person in charge of land for the eviction of unlawful occupiers from private property. Section 4(2)-(5) contains the procedural requirements that must be met before a court may grant an eviction order. Section 4(6) concerns unlawful occupiers that have occupied the land in question for less than six months and section 4(7) concerns unlawful occupiers that have occupied the land in question for more than six months at the time when the proceedings are initiated. Both sections 4(6) and 4(7) set out factors that the court needs to consider when granting an eviction order.

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<sup>135</sup> AJ van der Walt "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *South African Journal on Human Rights* 144-161 at 149 states that eviction is a strong private law remedy, which inevitably means that eviction is a locus classicus where the tension between stability and change and the relationship between constitutional transformation and private law emerge most strongly.

<sup>136</sup> 2005 (1) SA 217 (CC) para 19.

<sup>137</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

<sup>138</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

The main difference between the two subsections is that only section 4(7) requires the court to consider whether there is alternative land available or can reasonably be made available by a municipality or other organ of state for the relocation of the unlawful occupier(s). The factors set out in sections 4(6) and 4(7) of PIE give effect to section 26(3) of the Constitution, which emphasises the need to seek concrete and case-specific solutions to the difficult problems that may arise in eviction proceedings.<sup>139</sup> In terms of section 4(8) the court must grant an eviction order if it is satisfied that all the requirements of section 4 has been met and that no valid defence has been raised by the unlawful occupier(s). When a court grants an eviction order under section 4(8) of PIE, it has to determine (a) a just and equitable date upon which the unlawful occupier(s) must vacate the land in question and (b) the date upon which the eviction order may be enforced if the unlawful occupier(s) failed to vacate the land on the date specified in (a). In terms of section 4(9), the court's determination of a just and equitable date upon which the unlawful occupier(s) must vacate the land in question under section 4(8) must be determined with regard to all the relevant factors, including the period of unlawful occupation.

The availability of alternative land plays a crucial role in eviction proceedings, especially with regard to the date upon which an eviction order may be enforced. According to Van der Walt, a landowner is entitled to the enforcement of his eviction order but before such eviction order may be enforced provision has to be made for the future accommodation of the unlawful occupiers once they have been removed from the land in question.<sup>140</sup> In this respect, PIE recognises and protects the property interests of the affected landowner but requires a certain measure of patience and empathy towards the unlawful occupiers who stand to become homeless once the

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<sup>139</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 22.

<sup>140</sup> AJ van der Walt "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *South African Journal on Human Rights* 144-161 at 150.

eviction order is carried out.<sup>141</sup> Although PIE authorises deprivation of property in the sense of suspending the enforcement of the eviction order granted by the court, the deprivation may become arbitrary if the period of suspension endures for an unreasonable period of time rendering the portion of land unlawfully occupied useless for the duration of the unlawful occupation.

In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*<sup>142</sup> (*Modderklip*) the large number of unlawful occupiers and the state's refusal to assist made it impossible for the affected landowner to enforce his eviction order.<sup>143</sup> The portion of land unlawfully occupied in this case was once part of a fully operational farm but the landowner has since the unlawful occupation had no use of the affected land. Both the Supreme Court of Appeal and the Constitutional Court agreed that it is unreasonable and it cannot be expected of a private property owner to provide accommodation for the occupiers. Therefore, the state was ordered to pay compensation to the affected landowner. The compensation was not compensation for expropriation since there was no expropriation of the property in question. Rather, the compensation was a kind of non-expropriatory equalisation as discussed above, aimed at evening out the harsh and disproportionate burden that resulted from the application of PIE, which required the owner to wait for an excessively long time before he could obtain the eviction, while the state was attempting to find alternative accommodation. Although PIE does not authorise the courts to award compensation, the court derived its authority

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<sup>141</sup> AJ van der Walt "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *South African Journal on Human Rights* 144-161 at 159.

<sup>142</sup> 2005 (5) SA 3 (CC).

<sup>143</sup> See the discussion of the *Modderklip* decision below.

directly from the Constitution and the compensation was therefore in the form of constitutional damages.<sup>144</sup>

The *Modderklip* decision serves as an example that the regulatory burden imposed by PIE may in some instances be deemed substantively arbitrary. However, PIE fulfils an important public purpose, especially in ensuring that evictions takes place in a humane and constitutional manner. It would have disastrous consequences for the public interest if PIE were to be declared invalid for authorising arbitrary deprivation of property. The possibility of invalidation of PIE can be avoided if the legislature made provision for compensation in instances where the period of suspension may extend beyond that which can reasonably be expected of landowners to endure without the payment of compensation. In *Modderklip* the court awarded compensation on the basis of constitutional damages, but in view of the argument in this chapter it might be more appropriate if the authorising legislation itself included such a provision.

## 5 Constitutional damages

### 5.1 Introduction

When a court considers the validity of a specific piece of legislation, it should try to interpret the legislation in a manner that would bring it in line with the Constitution in terms of section 39(2).<sup>145</sup> If this is not possible the legislation is invalid.<sup>146</sup> However, it is argued in chapter 1 that the invalidation of legislation that serves a necessary and

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<sup>144</sup> See the discussion on constitutional damages below.

<sup>145</sup> AJ van der Walt *Property and constitution* (2012) 23.

<sup>146</sup> AJ van der Walt *Property and constitution* (2012) 24.

important public purpose is not always appropriate. The invalidation of such legislation will sometimes create a vacuum in a specific area that requires and depends on state regulation, for example eviction. It would create public upheaval and result in injustice if landowners could evict unlawful occupiers at whim. Furthermore, in some instances declaring the legislation that brought about the infringement invalid will not provide appropriate relief that just and equitably vindicates the claimant's fundamental right. For example, invalidating social welfare legislation that grants the administrator an overly wide discretion to decide whether to award social welfare benefits to an applicant would not vindicate the right of a claimant whose rights were unjustly and unconstitutionally infringed by the administrator's decision not to grant the social welfare benefits. In these instances, where legislation, common law or customary law do not and cannot be interpreted or developed to bring it in line with the Constitution but where the invalidation thereof would not be in line with section 39(2) of the Constitution either, it becomes necessary for courts to step in and award constitutional remedies.

Constitutional damages constitutes one remedy to provide appropriate relief that is just and equitable to vindicate the violation of a fundamental right in the Bill of Rights. Constitutional damages is awarded directly from a provision in the Constitution rather than from the common law or legislation.<sup>147</sup> Damages awards that flow from the common law or legislation provide indirect relief.<sup>148</sup> The Constitutional Court considered and confirmed the availability of the remedy of constitutional damages in the constitutional regime for the first time in *Fose v Minister of Safety and*

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<sup>147</sup> M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 156.

<sup>148</sup> M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 151.

*Security (Fose)*.<sup>149</sup> *Fose* also provides the framework for the interpretation and application of the term “appropriate relief” in terms of section 38 of the Constitution. Subsequent to the Constitutional Court’s recognition of constitutional damages as appropriate relief in the *Fose* decision, this remedy has only been successful in a handful of cases. The remedy of constitutional damages is analysed below in relation to case law in which this remedy was considered, to evaluate the circumstances and factors that courts consider to determine when constitutional damages will be appropriate relief.

In *Fose v Minister of Safety and Security*<sup>150</sup> (*Fose*) the Constitutional Court delivered a ground-breaking decision on the availability of constitutional damages as a remedy for infringements of constitutional rights in South African law. The Court had to consider whether constitutional damages constituted “appropriate relief” for purposes of section 7(4)(a) of the Interim Constitution, which is the predecessor of section 38 of the 1996 Constitution.<sup>151</sup> More specifically, the Court had to determine whether it was competent in law to award damages, over and above common law damages to which the plaintiff was entitled, for a flagrant infringement of one or more of the fundamental rights entrenched in the Bill of Rights. In this case, the plaintiff (*Fose*) sued the defendant (Minister of Safety and Security) for damages arising out of a series of assaults perpetrated by members of the police force acting within the course and scope of their employment. In addition to common law delictual damages the plaintiff also claimed constitutional damages, which included an element of punitive damages. It was alleged that assault and torture were part of a widespread

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<sup>149</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 60. See also I Currie & J De Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 201; S Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 438; M Bishop “Remedies” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 156.

<sup>150</sup> 1997 (3) SA 786 (CC).

<sup>151</sup> See Kriegler J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 89.



pattern of abuses at the particular police station. The plaintiff argued that the common law does not provide a remedy sufficient to accentuate the importance of human rights violations.<sup>152</sup>

The Court held that “appropriate relief” is “relief that is required to protect and enforce the Constitution”.<sup>153</sup> What is appropriate will depend on the circumstances of each particular case. In light of the egregious human rights violations that preceded the constitutional dispensation, the Court held that

“this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our [historical] context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. ... The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal”.<sup>154</sup>

The Court held that there is no reason in principle why “appropriate relief” should not include an award of damages, especially where such an award is necessary to protect and enforce the rights in the Bill of Rights.<sup>155</sup> However, whether such a remedy would be appropriate will depend on the circumstances of each case and the particular right that has been infringed.<sup>156</sup> The Court considered the availability of delictual damages in this case and stated that the common law of delict is flexible and should, in terms of section 39(2), be developed by the courts to promote the spirit, purport and objects of the Bill of Rights.<sup>157</sup> Furthermore, the Court held that the common law will in most cases be broad enough to provide appropriate relief for a

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<sup>152</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 16.

<sup>153</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

<sup>154</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69 (footnotes omitted).

<sup>155</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 60.

<sup>156</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 60.

<sup>157</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 58.

breach of constitutional rights, but it will always depend on the circumstances of each particular case.<sup>158</sup>

In a separate but concurring judgment Kriegler J accepted the plaintiff's argument that the aim of remedies under section 38 differs from the aim of a common law remedy.<sup>159</sup> One difference is that the relief provided by the common law is more specific and victim focussed, whereas the relief provided by the Constitution is more general in its application, so it may directly affect a wide range of people.<sup>160</sup> Furthermore, the harm that arises from a violation of the Constitution is a harm to society as a whole.<sup>161</sup> The judiciary is tasked primarily, albeit not exclusively, to prevent and vindicate violations of the Constitution. Judges, in the exercise of their discretion, should choose between appropriate forms of relief by carefully analysing the constitutional infringement and striking effectively at its source.<sup>162</sup> Furthermore, Kriegler J described appropriate relief as something that is "specially fitted or suited".<sup>163</sup> According to Kriegler J, suitability is measured by the "extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further [fundamental rights] violations".<sup>164</sup> In exercising judicial discretion, courts should consider the nature of the infringement and the probable impact of the particular remedy on the facts of the case before it.<sup>165</sup> According to Kriegler J, there is no reason in principle why common law and statutory remedies cannot be appropriate relief in the sense that they vindicate the Constitution and deter further

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<sup>158</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 58.

<sup>159</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95.

<sup>160</sup> Kriegler J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95, citing O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 229.

<sup>161</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95.

<sup>162</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 96.

<sup>163</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 97 (footnotes omitted).

<sup>164</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 97.

<sup>165</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 97.

violations of it.<sup>166</sup> Furthermore, there are powerful reasons for not excluding common law and statutory remedies from the ambit of section 38.<sup>167</sup> On the facts of this case there was no place for additional constitutional damages because delictual damages constituted adequate vindication of the constitutional rights in question.<sup>168</sup> Furthermore, the Court held that it would be inappropriate to use the limited and scarce resources of the government to pay punitive constitutional damages to plaintiffs who are already fully compensated in common law.<sup>169</sup>

The *Fose* decision confirms that constitutional damages, as a constitutional remedy, is only applicable when indirect remedies (interpreting the legislation and developing the common law or customary law to be in line with the Constitution) are incapable of vindicating the infringed fundamental rights in a just and equitable manner. Moreover, the decision confirms that it is not possible to claim constitutional damages over and above the compensation provided for in common law if such compensation already vindicate the claimant's infringed fundamental rights sufficiently. Although the Constitutional Court did not consider what the position would be in cases where the legislature explicitly provided for compensation in the relevant legislation, the Court's approach in this regard might by comparison be similar to its approach towards the availability of delictual damages in common law. In light of the Court's emphasis on the existence of a remedy in common law in *Fose* it seems unlikely that the Court will supplement the delictual damages with

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<sup>166</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 98.

<sup>167</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 99.

<sup>168</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 67.

<sup>169</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 65, 71-72. Some policy reasons raised against the remedy of constitutional damages aimed at punishment or deterrence is that the deterrent effect of punitive damages is difficult to assess; systemic change is a slow process and for it to happen a number of substantial punitive damages awards may be required, whereas equitable relief could achieve such change more speedily and less costly; punitive damages provides an unjustifiable windfall for the plaintiff; it is the function of the criminal law not the civil law to deter and punish wrongdoing; and where punitive damages are awarded against the government, it is almost inevitable that the costs thereof will be shifted to the public at large.

constitutional damages if the delictual damages proves to be insufficient to adequately vindicate the fundamental right in question. The Court will rather try to develop the common law in terms of section 39(2) of the Constitution to ensure that the delictual damages that is available in terms of the common law provides a suitable remedy. Moreover, by comparison, it seems equally unlikely that the Court will supplement the insufficient compensation provided for by legislation with constitutional damages. The Court will generally try to interpret the legislation in a manner that will render it in accordance with the Constitution. This might mean that the Court will if necessary extend the scope of the statutory compensation to bring it in line with the Constitution. In this context it should be noted that the notion of developing delictual damages wherever possible before considering constitutional damages does not apply to the situations that form the focus of this dissertation, since the regulatory actions that are at stake are lawful; there is therefore no possibility of awarding or extending delictual damages.

The possibility of constitutional damages was also considered in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*<sup>170</sup> (*Modderklip*). In this case a private landowner (Modderklip) approached the court for a declaratory order to the effect that the state was obliged to take immediate steps to remove the illegal occupiers who had settled on his property. At the time of illegal occupation Modderklip's property was a fully operational farm. The initial number of occupiers was 400 but during the course of the court proceedings the number rapidly increased to approximately 40 000 illegal occupiers. Modderklip laid charges of trespassing against the occupiers at the local police station but due to the growing size of the group of illegal occupiers, the police could not detain all the arrestees. Modderklip applied for an eviction order in terms of

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<sup>170</sup> 2005 (5) SA 3 (CC).

the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which was granted in 2001. The illegal occupiers, in contempt of court, remained on Modderklip's property. A writ of execution was issued but the Sheriff insisted that the eviction could only be executed with the help of private contractors at a cost of R2.2 million. The amount far exceeds the value of the piece of land that was illegally occupied. Modderklip was unwilling and unable to pay this amount.

The Supreme Court of Appeal held that Modderklip's rights to property and the rights of the occupiers to have access to adequate housing has been infringed.<sup>171</sup> It found that the state did not provide alternative accommodation for the occupiers. This would have enabled Modderklip to enforce the eviction order and it would also have enabled the occupiers to comply with the eviction order. Therefore, the state failed in its constitutional duty to protect the respective rights of Modderklip and that of the occupiers. The state's inaction allowed the burden of the occupiers' need for land to fall on an individual.<sup>172</sup> Moreover, the Supreme Court of Appeal held that it cannot be expected of Modderklip to bear the constitutional duty of the state to provide land for approximately 40 000 people without any compensation. Furthermore, it held that the ideal solution would have been for the state to expropriate the affected property, but emphasised that it is questionable whether a court may order an organ of state to expropriate property.<sup>173</sup> The Court stated that it has a duty "to mould an order that will

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<sup>171</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 18. See *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) at 693; *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 31.

<sup>172</sup> *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 30.

<sup>173</sup> *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) at 693. This point was again raised in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) paras 63-65 by

provide effective relief to those affected by a constitutional breach”; what effective relief entails should be determined on an *ad hoc* basis.<sup>174</sup> The Court concluded that the only appropriate relief in the particular circumstances of the case was to grant constitutional damages.<sup>175</sup> According to the Court no other remedy was apparent. The Court argued that the payment of damages to Modderklip would allow the occupiers to remain on the land and would recompense Modderklip for that which it had lost and the state had gained by not providing alternative land.<sup>176</sup>

The Constitutional Court confirmed the Supreme Court of Appeal’s order, albeit on different grounds. The Supreme Court of Appeal based its decision on violations of the rights to property (section 25) and housing (section 26), whereas the Constitutional Court based its decision on the state’s contempt for the rule of law and the right to have access to courts (section 34).<sup>177</sup> The Constitutional Court analysed the ambit and scope of the state’s obligations. The Constitutional Court held that the rule of law principle, which underlies our constitutional order, places a duty on the

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the Constitutional Court. The Constitutional Court held that it was not necessary to decide this point but stated that it will probably breach the separation of powers rule if the courts could order the state to expropriate a particular property. Furthermore, it pointed out that the Expropriation Act specifically provides that the decision to expropriate is reserved for the Minister of Public Works. Subsequently in *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) the Supreme Court of Appeal held that it is inappropriate if not incompetent to direct the state to expropriate the property in question. See also the discussion of this decision in AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 385-387; AJ van der Walt “Constitutional property law” 2009 *Annual Survey of South African Law* 218-258 at 256-258.

<sup>174</sup> *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) at 693. See also *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) paras 42-43.

<sup>175</sup> *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) at 693. See also *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 43.

<sup>176</sup> *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) at 693. See also *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 43.

<sup>177</sup> M Bishop “Remedies” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 158.



state to provide the necessary mechanisms for citizens to resolve disputes that may arise between them.<sup>178</sup> Although PIE was enacted to fulfil this obligation, the Court held that the state's obligation goes further than merely providing mechanisms and institutions for the resolutions of disputes.<sup>179</sup> It held that the state is also obliged to take reasonable steps, when necessary, to prevent large-scale disruptions of the public peace in the execution of court orders, which will undermine the rule of law.<sup>180</sup> Furthermore, the Constitutional Court stated that the nature of the state's obligation in a particular case will depend on what is reasonable, having regard to the nature of the right at risk as well as the circumstances of each case.<sup>181</sup> In this case, Modderklip followed the correct legal procedures and obtained a court order, which it could not enforce because the large number of unlawful occupiers would have nowhere to go and the state was either unwilling or unable to assist in enforcing it.<sup>182</sup> The Court held that it was unreasonable for a private property owner like Modderklip to be forced to bear the burden to provide the occupiers with accommodation. It is a burden that should be borne by the state.<sup>183</sup> Moreover, the mechanisms for executing court orders should be sufficient to deter self-help and allow the execution of court orders in a manner that prevents social upheaval.<sup>184</sup>

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<sup>178</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 39.

<sup>179</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 43.

<sup>180</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 43.

<sup>181</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 43.

<sup>182</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 44.

<sup>183</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 45.

<sup>184</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 46.



The Constitutional Court emphasised that the circumstances of this case were extraordinary. It would not have been possible to rely on the traditional mechanisms normally used to execute eviction orders, nor would it have been consistent with the rule of law to evict the sheer number of people who had nowhere else to go.<sup>185</sup> Furthermore, the Constitutional Court took into account that the progressive realisation of housing is not an easy task and that it requires careful planning and that orderly and predictable processes are vital but, at the same time, it stated that “[i]f reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary”.<sup>186</sup> The Court concluded that the state had not proffered any acceptable reason for its failure to assist Modderklip and this failure had accordingly breached Modderklip’s constitutional rights to an effective remedy as is required by the rule of law and entrenched in section 34 of the Constitution.<sup>187</sup> In its determination of what would be an appropriate remedy the Court held that “[a]ppropriate relief must necessarily be effective”.<sup>188</sup> The Court concluded that in the circumstances of the case, the award of compensation made by the Supreme Court of Appeal was the most appropriate, effective and expeditious way of vindicating the rights of both Modderklip and the occupiers.<sup>189</sup>

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*<sup>190</sup> (*Blue Moonlight*) the Constitutional Court was again confronted with a claim for constitutional damages in relation to the eviction of

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<sup>185</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 47.

<sup>186</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 49.

<sup>187</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) paras 50-51.

<sup>188</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 58.

<sup>189</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 65.

<sup>190</sup> 2012 (2) SA 104 (CC).

unlawful occupiers from private property. The facts of this case appear similar to those in *Modderklip* but in fact are subtly but significantly different. In *Blue Moonlight* the owner of commercial property in the central business district of Johannesburg (Blue Moonlight) sought an eviction order against the unlawful occupiers residing on its property. Blue Moonlight acquired the property in 2004 for redevelopment purposes but could only start to demolish the existing building once the unlawful occupiers had been evicted. The property in question has been occupied, for a considerable period of time, by 86 people. The condition of the property deteriorated over the years to such an extent that it constituted a “dangerous building” under the City’s by-laws. All the occupiers have been occupying the property for more than six months and have been paying rent and even effected some repairs to the property at their own expense. In 2005 Blue Moonlight posted two notices to vacate the property and simultaneously purported to cancel any lease that may have existed. In 2006 Blue Moonlight commenced eviction proceedings in terms of PIE. The unlawful occupiers opposed the eviction on the basis that they would be rendered homeless if the eviction order was granted. The High Court granted an eviction order as well as an order for compensation, in an amount equivalent to fair and reasonable monthly rental from a certain period until the eviction date. The court considered it bound by the Supreme Court of Appeal’s constitutional damages award in *Modderklip* and held that Blue Moonlight’s property rights have similarly been infringed.<sup>191</sup>

However, the Supreme Court of Appeal upheld the eviction order but set aside the order for compensation. The Supreme Court of Appeal held that this case was factually distinguishable from *Modderklip*, and emphasised that *Modderklip* is by no means authority for the proposition that constitutional damages will always be

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<sup>191</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] ZAGPJHC 3 (4 February 2010) para 105.

available, or appropriate, as a remedy whenever a fundamental right has been breached.<sup>192</sup> Moreover, the Supreme Court of Appeal held that the facts of *Modderklip* were exceptional and therefore justified the payment of compensation, which was the only remedy that was appropriate in the circumstances of the case. The Supreme Court of Appeal distinguished *Modderklip* from this case: In *Modderklip* the eviction order had already been granted but ignored by the unlawful occupiers; the private landowner was the innocent victim of land invasion and he took all reasonable steps within a reasonable time to safeguard his interests; and the large number of occupiers on the land, and the failure of the state to provide assistance to them, made it impossible for the landowner to enforce the eviction order. In *Blue Moonlight*, on the other hand, the compensation order was made ancillary to the eviction order; there was nothing to suggest that Blue Moonlight would not have been able to execute the eviction order if it had to; the occupation was once lawful; and Blue Moonlight bought the property with full knowledge that it was being occupied by a number of persons.<sup>193</sup> In the light of these facts, the Supreme Court of Appeal concluded that compensation was not an appropriate remedy in this case.<sup>194</sup>

The Constitutional Court confirmed this decision, holding that the enforcement of an eviction order may be delayed on equitable grounds, although an indefinite delay would amount to an arbitrary deprivation of property as meant by section 25(1) of the Constitution.<sup>195</sup> The Constitutional Court accepted that “[u]nlawful occupation

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<sup>192</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) para 70.

<sup>193</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) para 71.

<sup>194</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) para 71.

<sup>195</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 31.

results in a deprivation of property under section 25(1)".<sup>196</sup> However, section 25(1) does not prohibit deprivation in general, only arbitrary deprivation of property. The Court stated that the provisions of PIE are not designed to allow for the expropriation of land.<sup>197</sup> The purpose of PIE is to regulate the eviction process. Tension between the competing interests of the occupiers and the affected landowner is inevitable in eviction proceedings. PIE allows for eviction of unlawful occupiers only when it is just and equitable and provides a list of factors that courts need to consider in the determination of what is just and equitable.<sup>198</sup> Although it cannot be expected of the property owner to provide free housing for the homeless indefinitely, an owner may, in certain circumstances, have to be patient and tolerate the temporary restriction on the right to the use and enjoyment of his property.<sup>199</sup> The Court stated that the rights of a property owner must be interpreted within the context of the requirement that eviction must be just and equitable.<sup>200</sup> All the relevant circumstances must be taken into account to determine whether, under what conditions and by which date eviction would be just and equitable. One factor that the court needs to consider is the availability of alternative accommodation for the occupiers.<sup>201</sup> According to the Constitutional Court, the fact that Blue Moonlight was aware of the presence of the occupiers when it purchased the property must have connoted to it the possibility of

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<sup>196</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 37.

<sup>197</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) paras 31, 36. See also *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) paras 17-18.

<sup>198</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) paras 37, 39.

<sup>199</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) paras 40, 96. See also AJ van der Walt "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *South African Journal on Human Rights* 144-161 at 159.

<sup>200</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 97.

<sup>201</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) paras 41, 96.

having to reasonably endure the occupation for some time.<sup>202</sup> Blue Moonlight has to endure the reasonable and temporary limitation of its property, without compensation, to give the City a reasonable time to comply with its obligation of providing alternative accommodation to the occupiers who stand to be evicted.<sup>203</sup> However, the Court stressed that it cannot be expected of Blue Moonlight to bear the burden of providing accommodation to the occupiers indefinitely.

The *Modderklip* and *Blue Moonlight* decisions indicate that the Constitutional Court considers the actions and knowledge of the landowner, the fundamental rights affected, the actions of the state, and the duration of the unlawful occupation of the relevant property important in determining whether the regulatory burden imposed on the landowner is in fact disproportionate to the purpose of PIE and therefore arbitrary. Furthermore, the Court considers whether the measures and institutional support provided for in PIE are sufficient to vindicate the infringement of the landowner's property rights. In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others*<sup>204</sup> (*Mkontwana*) the Constitutional Court held that ownership entails certain rights and responsibilities, which give owners some power to limit the potential deprivation of their property rights.<sup>205</sup> In *Mkontwana* the Court held that owners have the responsibility to take steps to evict unlawful occupiers on their property. In *Modderklip* both the Supreme Court of Appeal and the Constitutional Court found that the landowner (*Modderklip*) took all

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<sup>202</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 40.

<sup>203</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 100.

<sup>204</sup> 2005 (1) SA 530 (CC) paras 45, 109.

<sup>205</sup> See the discussion of the *Mkontwana* decision in chapter 1.

the necessary steps within a reasonable time to safeguard his interests. The mechanisms provided for in PIE did not provide any measures to alleviate the burden that resulted in the specific case. The deprivation did not result from the unlawful occupation of Modderklip's property, since deprivation may only be legitimate if it is in accordance with law of general application. The occupiers were not authorised to occupy Modderklip's property. The deprivation in *Modderklip* resulted from the inaction of the state in assisting Modderklip with the enforcement of the eviction order. According to the Constitutional Court the state's failure to act infringed Modderklip's right to have access to courts (section 34) and the rule of law principle that requires the state to provide mechanisms for citizens to resolve any dispute by the application of law. Modderklip had to endure the unlawful occupation of its property for a long period of time and had no use of his property during the period of unlawful occupation. Declaring PIE invalid would not have provided Modderklip with appropriate relief, nor would the constitutional remedy of a declaration of rights have done so. Therefore, in *Modderklip* no other remedy than a constitutional award of compensation was appropriate.

In *Blue Moonlight*, on the other hand, the Court found that there was nothing in the facts of the case to indicate that the landowner (Blue Moonlight) would not have been able to enforce his eviction order. Furthermore, the Court held that Blue Moonlight had full knowledge of the unlawful occupation before it purchased the property, therefore it should have known or should reasonably have been aware that its rights in relation to his property might be temporarily limited in the process of evicting the unlawful occupiers from the premises. In this regard Blue Moonlight's right to property has been infringed. But section 25 does not prohibit deprivation of property in general, it only prohibits arbitrary deprivation of property. The Court held that the deprivation of property that resulted from the temporary suspension of the

enforcement of the eviction order did not impose an excessive or harsh burden on Blue Moonlight. The temporary suspension of the eviction order was necessary to give the state a reasonable opportunity to find alternative accommodation for the unlawful occupiers. The section 26 rights of the unlawful occupiers would have been infringed if the eviction order was made enforceable with immediate effect, since the unlawful occupiers would then have been rendered homeless. In light of the importance of the temporary suspension of the eviction order and on the facts of the case there was no arbitrary deprivation of Blue Moonlight's property rights, therefore it was not necessary for the Court to consider the applicability of constitutional damages or any other remedy. However, in *Blue Moonlight* the Court emphasised that the temporary deprivation of a landowner's property rights that results from the suspension of the enforcement of the eviction order may not endure for an indefinite period. If the suspension period of the eviction order is unreasonably long, the deprivation might become arbitrary and therefore unconstitutional. It is in this regard appropriate and necessary for the amendment of PIE to include a compensation provision (similar to equalisation payments in German law).<sup>206</sup> The compensation provision may prevent certain deprivations caused by long delays in obtaining an eviction order from being arbitrary, even if the delay is extended for what seems like an unreasonably long time.<sup>207</sup>

The possibility of constitutional damages was also considered in the context of socio-economic rights. In *MEC, Department of Welfare, Eastern Cape v Kate*<sup>208</sup> (*Kate*), the Supreme Court of Appeal considered whether the unexplained and unreasonable 40 month delay by the state in considering the claimant's (*Kate*) application for a disability grant entitled her to constitutional damages. The Supreme

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<sup>206</sup> See also the discussion of PIE above.

<sup>207</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 279.

<sup>208</sup> 2006 (4) SA 478 (SCA).



Court of Appeal held that the state's conduct infringed Kate's right to social assistance in terms of section 27 of the Constitution.<sup>209</sup> The Supreme Court of Appeal held that what would constitute appropriate relief must be determined casuistically with due regard to, amongst other things, "the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned".

Contrary to the Constitutional Court's attitude towards constitutional damages, and to constitutional remedies in general, evident in *Fose*, *Modderklip* and *Blue Moonlight*, the Supreme Court of Appeal stated that "the relief that is permitted by [section] 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights".<sup>210</sup> Furthermore, the Court held that there will be cases that require a direct, rather than indirect, assertion and vindication of constitutional rights and where this is so, the next inquiry will relate to what form of remedy would be appropriate.<sup>211</sup>

With regard to the facts of the case, the Supreme Court of Appeal concluded that Kate was entitled to a direct constitutional remedy and held that the only appropriate remedy in the circumstances was to award constitutional damages to recompense Kate for the infringement of her constitutional right.<sup>212</sup> The Court found the state's argument that the Court's order will put an extra strain on an already

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<sup>209</sup> Section 27 of the Constitution provides that everyone has the right to have access to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance".

<sup>210</sup> *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 27.

<sup>211</sup> *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 27.

<sup>212</sup> *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) paras 27, 33.

depleted public purse unconvincing. The Court held that it was the state's unlawful conduct that was the very cause for these monetary claims.<sup>213</sup>

The outcome in *Kate* seems correct and the facts of the case also seem to justify the award of constitutional damages. However, the Supreme Court of Appeal's reasoning regarding the relationship between constitutional remedies and indirect remedies is problematic and arguably incorrect. On the facts of the case, a claim for delictual damages was not possible. Furthermore, the Court held that the remedy of *mandamus* was available to the claimant and would probably have provided sufficient protection of her section 27 rights. However, on the facts of the case, the Court found that the remedy of *mandamus* would not have been effective in the hands of the specific claimant.<sup>214</sup> The Court considered that the nature of the right at issue is directed towards the very poorest in our society, who have little or no knowledge of their rights or the resources to readily secure them. The Court also took into consideration the influx of similar cases indicating that the problem that was faced by the claimant is endemic in the particular province. These factors led to a conclusion that an award of constitutional damages was the only appropriate remedy in the circumstances that vindicates the claimant's right and deters further violations. In this regard, the Supreme Court of Appeal's statement in *Kate* regarding the question of appropriate relief and the relationship between constitutional remedies and indirect remedies seems to be unnecessary, apart from the fact that it also appears to be in conflict with the Constitutional Court's approach to the applicability of constitutional remedies. Moreover, the Supreme Court of Appeal's approach seems to be in conflict with the one system of law principle set out in the *Pharmaceutical Manufacturers* decision by the Constitutional Court. In terms of this principle and the courts' duty in

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<sup>213</sup> MEC, Department of Welfare, Eastern Cape v *Kate* 2006 (4) SA 478 (SCA) para 32.

<sup>214</sup> MEC, Department of Welfare, Eastern Cape v *Kate* 2006 (4) SA 478 (SCA) para 31.

terms of section 39(2) of the Constitution, existing legislation should be interpreted and the common law developed to try to bring it in line with the Constitution. Only if this is impossible should courts consider constitutional remedies. Therefore, existing indirect remedies should first be considered and exhausted before resorting to constitutional remedies.

In *M and Another v Minister of Police*<sup>215</sup> the North Gauteng High Court had to consider a claim for constitutional damages in the context of an infringement of the constitutional right to parental care entrenched in section 28 of the Constitution.<sup>216</sup> In this case the deceased, who was also the family breadwinner, died after sustaining serious injuries during his unlawful detention by the police. The deceased's spouses instituted a common law claim for damages for loss of support. They also instituted a claim for constitutional damages on behalf of two minor children for the loss of parental care. It was argued that no claim for the loss of parental care is available in the common law of delict. Section 38 of the Constitution as well as section 15 of the Children's Act 38 of 2005 provide that a court may grant appropriate relief if a right in the Bill of Rights has been infringed. The court held that both the Constitutional Court and the Supreme Court of Appeal, in the decisions discussed above, recognise constitutional damages as part of our law.<sup>217</sup>

Although section 28 of the Constitution does not define the right to family or parental care, section 1 of the Children's Act provides an elaborate definition of "care".<sup>218</sup> The court held that a child's claim for the loss of support or maintenance in

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<sup>215</sup> 2013 (5) SA 622 (GNP). See also a brief discussion of this decision in D Matlala "The law reports" 2013 *De Rebus* 35-40 at 35.

<sup>216</sup> Section 28(1)(b) provides that every child has the right to "family care or parental care, or to appropriate alternative care when removed from the family environment".

<sup>217</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 17.

<sup>218</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 5.

terms of the common law of delict is restricted to material or financial support.<sup>219</sup> However, the content of the right to parental care goes further than just the need for financial support.<sup>220</sup> According to the court, loss of support does not include an award for loss of parental care.<sup>221</sup> The court stated that a child cannot claim for both loss of support and deprivation of parental care separately as the former is part of the latter.<sup>222</sup> According to the court, allowing both claims would amount to duplication and undue enrichment.<sup>223</sup> The court referred to the Constitutional Court's statement in *Fose* that the common law is flexible and should be developed in terms of section 39 of the Constitution.<sup>224</sup> However, it held that development of the common law in this case would not provide relief that is appropriate for the infringement of section 28 of the Constitution.<sup>225</sup> The parent and child relationship is now governed by statute and no longer by the common law.<sup>226</sup> Therefore, the development of the concept of loss of support had to be effected within the context of the relevant sections of the Children's Act read with section 28 of the Constitution.<sup>227</sup> The court held that the right to parental care deserves constitutional protection and enforcement.<sup>228</sup> Consequently, the court concluded that a claim for damages arising from a breach of

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<sup>219</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 6.

<sup>220</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) paras 22, 24. The court referred to the decision of *Jooste v Botha* 2000 (2) SA 1999 (T) para 201 that states that the parent-child relationship consists of two aspects, namely an economic aspect of providing for the child's physical needs and an intangible aspect of providing for a child's psychological, emotional and developmental needs.

<sup>221</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 44.

<sup>222</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 51.

<sup>223</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 51.

<sup>224</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 42.

<sup>225</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) paras 43-44.

<sup>226</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 43.

<sup>227</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 44.

<sup>228</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 52.

this right must be based on the relevant provision of the Children's Act read with section 28 of the Constitution.<sup>229</sup>

This decision provides a good illustration of the relationship between the different sources of law. The Constitutional Court, in terms of the single system of law principle,<sup>230</sup> sets out certain principles ("subsidiarity principles")<sup>231</sup> that function as guidelines to help courts identify when to apply legislation, a constitutional provision or the common law.<sup>232</sup> In terms of the subsidiarity principles, if legislation is enacted to give effect to a constitutional right, conflicts regarding that right should be adjudicated with reference to the legislation rather than the Constitution or the common law.<sup>233</sup> Therefore, the correct approach for a claimant who argues that a right protected by the Constitution has been infringed is to rely on the legislation specifically enacted to give effect to that right. In these circumstances the claimant may not rely on the constitutional provision directly, unless he wants to challenge the legislation for constitutional invalidity.<sup>234</sup> Moreover, a claimant may in these circumstances not rely on the common law directly either.<sup>235</sup> According to Van der

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<sup>229</sup> *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) para 53.

<sup>230</sup> In *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44 the Constitutional Court held that "[t]here is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".

<sup>231</sup> Although the Constitutional Court does not refer to these principles explicitly as "subsidiarity principles", the case law seems to indicate that the Court uses these principles as guidelines to determine the source of law applicable to a particular dispute. "Subsidiarity principles" is the term used by AJ van der Walt *Property and constitution* (2012) 37 to distinguish and explain the Constitutional Court's approach with regard to this determination of the applicable source of law.

<sup>232</sup> AJ van der Walt *Property and constitution* (2012) 35.

<sup>233</sup> AJ van der Walt *Property and constitution* (2012) 36.

<sup>234</sup> AJ van der Walt *Property and constitution* (2012) 36. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 30.

<sup>235</sup> AJ van der Walt *Property and constitution* (2012) 36. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 96.

Walt, these subsidiarity principles developed by the Constitutional Court define the space where interpretation of legislation in terms of section 39(2) and the development of the common law in terms of section 39(2) must take place.<sup>236</sup> By implication, a conflict should only be decided directly on the basis of the relevant constitutional provision where no legislation has been enacted to give effect to a right protected by the Constitution and the right is not protected by the common law either.<sup>237</sup>

Therefore, in light of the subsidiarity principles it is incorrect to view the compensation awarded in *M and Another v Minister of Police*<sup>238</sup> as constitutional damages. Constitutional damages is damages that is awarded on the basis of a direct constitutional provision (section 38 read with section 172(1)(b) of the Constitution). However, in this case legislation had been enacted (Children's Act 38 of 2005) to give effect to a right in the Constitution, namely section 28 of the Constitution. Furthermore, section 15 of the Act authorises the court to award appropriate relief to a claimant whose rights in the Bill of Rights have been infringed. In this case, the court interpreted the legislation with reference to section 38 of the Constitution to determine what would constitute appropriate relief. The court's choice to award compensation was based on a statutory provision, namely section 15 of the Children's Act 38 of 2005) and not directly on the constitutional provision. Therefore, the compensation was not constitutional damages but statutory damages.

The fact that the compensation was based on a judicial interpretation of legislation which did not specifically provide for compensation (as required in German law for a valid equalisation measure) but rather just for appropriate relief in general,

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<sup>236</sup> AJ van der Walt *Property and constitution* (2012) 37.

<sup>237</sup> AJ van der Walt *Property and constitution* (2012) 39.

<sup>238</sup> 2013 (5) SA 622 (GNP). See also a brief discussion of this decision in D Matlala "The law reports" 2013 *De Rebus* 35-40 at 35.

makes it interesting. It may be an indication that it is possible to interpret legislation that would otherwise have been unconstitutional for not sufficiently protecting a constitutional right as giving rise to a duty to pay compensation, even though the legislation does not specifically authorise the court to provide compensation but does not explicitly preclude the possibility of compensation either. Furthermore, there was no indication that it was not the legislature's intention that compensation may not be appropriate relief. If this interpretation of the decision is correct, it might be an indication that courts are willing to interpret legislation widely in terms of section 39 of the Constitution to include the payment of compensation in instances where the regulatory statute may be excessive and disproportionate and therefore arbitrary. However, this approach is subject to the condition that there is no contrary indication with regard to the legislature's intention or express exclusion of compensation in the specific legislation. In this respect, the South African approach regarding the wide interpretation of legislation in terms of section 39 of the Constitution to extend the existing provision of compensation or read in a duty to pay compensation in the instances where the statute may otherwise be subject to invalidity for authorising the type of excessive regulatory burden discussed in chapter 1, corresponds to some degree with the French, Dutch and Belgian courts' approach to award compensation in terms of the *égalité* principle, even in the absence of express statutory authority to do so.

## 5.2 *Constitutional damages as an appropriate constitutional remedy*

Constitutional damages is one of the constitutional remedies that a court may award when a right in the Bill of Rights has been infringed.<sup>239</sup> The courts' primary, although

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<sup>239</sup> I Currie & J De Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 180 mention four major types of constitutional remedies: Declaration of invalidity; declaration of rights; prohibitory interdicts; and constitutional damages.



not exclusive, function is to protect and uphold the Constitution.<sup>240</sup> Therefore, when the state deprives owners of their property rights in a manner that is arbitrary as meant in section 25(1) of the Constitution, the courts must give effect to the Constitution, which includes the vindication of the infringed fundamental right. This means that the courts must award a remedy which is appropriate, just and effective to vindicate the right infringed in the specific case.

The remedy is dependent on the source of law that regulates the specific dispute. Van der Walt points out that the simultaneous existence of various sources of law, namely the Constitution, legislation, common law and customary law, which are often diverging and occasionally conflicting, sometimes makes it difficult to identify the source of law applicable in a particular dispute.<sup>241</sup> Furthermore, it cannot be assumed that the Constitution will always apply directly because it is the supreme law.<sup>242</sup> The Constitution requires all law to promote the spirit, purport and objects of the Bill of Rights.<sup>243</sup>

If a fundamental right has been infringed and the common law, customary law or relevant legislation does not provide a remedy or the remedy that is provided does not vindicate the infringement appropriately, the courts may have to apply a constitutional remedy. The Constitution entrusts courts with a wide discretion to fashion remedies that vindicate any violation of a right in the Bill of Rights. The

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<sup>240</sup> K O'Regan "Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa" (2012) 75 *The Modern Law Review* 1-32 at 2. See also C Okpaluba "Of 'forging new tools' and 'shaping innovative remedies': Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa" (2001) 12 *Stellenbosch Law Review* 462-483 at 469.

<sup>241</sup> AJ van der Walt *Property and constitution* (2012) 13. See the discussion on subsidiarity principles above.

<sup>242</sup> AJ van der Walt *Property and constitution* (2012) 15. Section 2 of the Constitution states that the Constitution is the supreme law of the Republic.

<sup>243</sup> Section 39(2) of the Constitution provides that a court, when interpreting legislation, and developing the common law or customary law, must promote the spirit, purport and the objects of the Bill of Rights.

Constitution provides remedial guidelines, albeit vaguely, in section 172(b)<sup>244</sup> and section 38.<sup>245</sup>

The relationship between section 172(1)(a) and section 172(1)(b) is problematic, especially with regard to the award of constitutional damages as a constitutional remedy. Section 172(1)(a) provides that a court *must* declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its invalidity, whereas section 172(1)(b) states that a court *may* make any order that is just and equitable. In light of the mandatory wording of section 172(1)(a) it is unclear whether courts have the authority to award constitutional damages without declaring the legislation in question that authorises the infringement invalid. Section 2 of the Constitution (the supremacy clause) states that the Constitution is the supreme law of the Republic and law or conduct inconsistent with the Constitution is invalid. However, section 2 states further that the obligations imposed by the Constitution *must* be fulfilled. The latter part of section 2 arguably trumps section 172(1)(a) of the Constitution in the sense that if the invalidation of legislation would lead to the non-fulfilment of a constitutional obligation necessary for the achievement of an important public purpose, the legislation should stand but the court should then look to section 172(1)(b) read with section 38 to apply a just and effective and appropriate remedy, which includes constitutional damages, to vindicate the fundamental rights infringement in question.

Both section 38 and section 172(1)(b) are applicable in the determination of the appropriate constitutional remedy in a specific case. However, the precise

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<sup>244</sup> Section 172(1)(b) provides that a court, when deciding a constitutional matter within its power, may make any order that is just and equitable; including an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

<sup>245</sup> Section 38 provides that anyone in the Bill of Rights has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

relationship between these two sections is unclear. Furthermore, these two sections use different terminology. Section 172(b) provides that a court may make any order that is “just and equitable”, whereas section 38 provides that the court may grant “appropriate relief”. Although section 38 and section 172(1)(b) use different terminology, courts generally read these sections together and use the terms of the provisions interchangeably; arguing that it is illogical to attach separate meanings to the terms “appropriate relief” and “just and equitable relief”.<sup>246</sup> Courts have emphasised the fact that there is no uniform formula as to what would constitute appropriate relief; what would be appropriate has to be determined on the facts of each individual case.<sup>247</sup> When courts exercise their remedial discretion, they should bear in mind their constitutional mandate and the purpose of constitutional remedies. O'Regan states that determining an appropriate constitutional remedy in a

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<sup>246</sup> In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) the Constitutional Court considered Canadian case law that draws a distinction between “appropriate” and “just” relief. Section 24(1) of the Canadian Charter of Rights and Freedoms 1982 provides that “[a]nyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances”. In *Re Kodellas et al and Saskatchewan Human Rights Commission et al; Attorney-General of Saskatchewan, Intervenor* (1989) 60 DLR (4<sup>th</sup>) 143 para 187 (*Kodellas*) the Canadian Supreme Court held that justness is a wider concept than appropriateness, and it requires a broader set of criteria to be considered. According to Ackermann J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 38, there is no material difference between these two concepts, because relief that is unjust to others could not be classified as appropriate. Moreover, in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 42 fn 36 (*Hoffmann*) the Constitutional Court explicitly rejected the *Kodellas* decision and held that our Constitution does not make the similar distinction as the Canadian Charter does between “appropriateness and “justness”. Furthermore, with regard to the relationship between these two concepts, the Court in *Hoffmann* held that

“‘appropriate relief’ must be construed purposively, and in the light of [section] 172(1)(b), which empowers the Court, in constitutional matters, to make ‘any order that is just and equitable’. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate”.

See also M Bishop “Remedies” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 57-59.

<sup>247</sup> See the cases on constitutional damages discussed above.

constitutional case is often the most difficult aspect of the case.<sup>248</sup> This task may sometimes require courts to engage with contentious issues.<sup>249</sup>

Judicial activism is the process whereby courts put into practice the Constitution's avowed undertaking to "forge new tools and fashion innovative remedies" to ensure that effective relief is granted for the infringement of fundamental rights.<sup>250</sup> The powerful statement by Kriegler J in *Fose* holds that when courts award a constitutional remedy in constitutional cases, they "attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause contained in section 2 of the Constitution]".<sup>251</sup> In *Fose* the Constitutional Court stated that the harm that arises from a violation of the Constitution is a harm to society as a whole.<sup>252</sup> Therefore, the importance of appropriate and effective relief for the infringement of fundamental rights is crucial. Ineffective remedies undermine respect for the courts, for the rule of law, and for the Constitution itself.<sup>253</sup> In determining what would be appropriate relief, courts take into account the interests of the state, the public at large, the victims of the unconstitutionality and the complainant before the court.<sup>254</sup> Roach and Budlender

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<sup>248</sup> K O'Regan "Fashioning constitutional remedies in South Africa: Some reflections" (2011) 24 *Advocate* 41-44 at 44.

<sup>249</sup> K O'Regan "Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa" (2012) 75 *The Modern Law Review* 1-32 at 21.

<sup>250</sup> C Okpaluba "Of 'forging new tools' and 'shaping innovative remedies': Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa" (2001) 12 *Stellenbosch Law Review* 462-483 at 466.

<sup>251</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94. See also I Currie & J De Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 180.

<sup>252</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95.

<sup>253</sup> K Roach & G Budlender "Mandatory Relief and supervisory jurisdiction: When is it appropriate, just and equitable?" (2005) 122 *South African Law Journal* 325-351 at 351.

<sup>254</sup> C Okpaluba "Of 'forging new tools' and 'shaping innovative remedies': Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa" (2001) 12 *Stellenbosch Law Review* 462-483 at 468.

emphasise that courts should, when determining an appropriate remedy, examine the underlying reasons why the state failed to respect constitutional rights.<sup>255</sup>

Although it is the duty of the courts to protect and uphold the Constitution, they should be conscious not to encroach upon the domain of the legislative and executive branches of government.<sup>256</sup> However, virtually all disputes before the courts inevitably implicate the separation of powers doctrine.<sup>257</sup> In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996*<sup>258</sup> (First Certification Case) the Constitutional Court held that the separation of powers doctrine underlies the Constitution. The purpose of this doctrine is to diffuse and accordingly constrain the respective powers of the three arms of government, which in turn enhances democracy, increases accountability and efficiency, and protects fundamental rights from state tyranny.<sup>259</sup> O'Regan points out that, comparatively speaking, there is no uniform conception of the separation of powers.<sup>260</sup> The separation of powers doctrine, in the South African context, is not a fixed or rigid constitutional doctrine.<sup>261</sup> The Constitutional Court conceded that intrusions of one branch of government on the terrain of another are

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<sup>255</sup> K Roach & G Budlender "Mandatory Relief and supervisory jurisdiction: When is it appropriate, just and equitable?" (2005) 122 *South African Law Journal* 325-351 at 351.

<sup>256</sup> C Okpaluba "Of 'forging new tools' and 'shaping innovative remedies': Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa" (2001) 12 *Stellenbosch Law Review* 462-483 at 469. P Langa "Transformative constitutionalism" (2006) 17 *Stellenbosch Law Review* 351-360 at 357 states that judges do not have a free rein to determine what the law is.

<sup>257</sup> M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383-417 at 395 states that there are polycentric elements present in almost all disputes before courts.

<sup>258</sup> 1996 (4) SA 744 (CC) para 112. See also K O'Regan "Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa" (2012) 75 *The Modern Law Review* 1-32 at 16.

<sup>259</sup> M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383-417 at 386.

<sup>260</sup> K O'Regan "Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa" (2012) 75 *The Modern Law Review* 1-32 at 16.

<sup>261</sup> C Hoexter *Administrative law in South Africa* (2<sup>nd</sup> ed 2012) 24. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 111.

unavoidable.<sup>262</sup> The Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*<sup>263</sup> held that the three branches of government should be sensitive to and respect this separation but this does not mean that courts cannot or should not make orders that have an impact on policy.<sup>264</sup> The extent of judicial involvement in the policy issues will depend on the facts and context of every specific case.<sup>265</sup>

Bishop argues that courts are not exceeding their powers when the exercise of their judicial discretion is indeed appropriate or just and equitable.<sup>266</sup> Roach and Budlender argue that some cases may require a higher level of judicial intervention, which indicates that there are escalating levels of remedies.<sup>267</sup> Bishop separates remedies into three categories, namely remedies that follow the invalidation of law; individual remedies; and remedies for systemic violations.<sup>268</sup> According to Bishop's categorisation of remedies, damages falls into the category of individual remedies. However, Bishop stresses that individual remedies are not strictly separable from systemic remedies or remedies following findings of invalidity; all three remedies are

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<sup>262</sup> C Hoexter *Administrative law in South Africa* (2<sup>nd</sup> ed 2012) 25. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 109.

<sup>263</sup> 2002 (5) SA 721 (CC) para 98.

<sup>264</sup> In the context of socio-economic rights adjudication, M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383-417 at 394 emphasises that although courts, presiding over cases that implicate policy matters, should exercise caution and awareness of the social consequences of its judgment, it cannot preclude judicial involvement in the social rights matter altogether.

<sup>265</sup> M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383-417 at 395, 405.

<sup>266</sup> M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 55.

<sup>267</sup> K Roach & G Budlender "Mandatory Relief and supervisory jurisdiction: When is it appropriate, just and equitable?" (2005) 122 *South African Law Journal* 325-351 at 346.

<sup>268</sup> M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 84-196.

interrelated.<sup>269</sup> Moreover, Swart argues that an award of a strong, affirmative remedy such as constitutional damages does not breach the separation of powers principle but rather enables courts to fulfil their constitutional mandate.<sup>270</sup> Currie and De Waal offer two reasons why an award of damages is important and necessary in suitable cases.<sup>271</sup> Firstly, there may be instances where an award of damages is the only effective remedy that will vindicate the fundamental right and deter future violations. These situations will include, for example, cases where an interdict or declaration of invalidity would make no sense and a declaration of rights or *mandamus* is too weak a remedy on the facts of the specific case. Secondly, an award of damages may encourage victims to come forward and litigate, which may in itself vindicate the Constitution and deter further violations.

In the discussion of the case law dealing with constitutional damages it is evident that the Constitutional Court is hesitant to award constitutional damages as a constitutional remedy. Constitutional remedies are generally forward-looking, community-orientated and structural rather than backward-looking, individualistic and corrective or retributive.<sup>272</sup> Moreover, constitutional remedies have a wider field of application and concern a broader range of interests that have to be balanced than indirect remedies. Constitutional damages is an exception to the general characteristics of constitutional remedies, since constitutional damages is generally individualistic and corrective. Furthermore, constitutional damages have inevitable budgetary implications and may pose a threat to the separation of powers principle. Therefore, in sum, constitutional damages is not a constitutional remedy that can

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<sup>269</sup> M Bishop "Remedies" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* Vol 1 (2<sup>nd</sup> ed OS 2008) chap 9 at 150-151.

<sup>270</sup> M Swart "Left out in the cold? Crafting constitutional remedies for the poorest of the poor" (2005) 21 *South African Journal on Human Rights* 215-240 at 240.

<sup>271</sup> I Currie & J De Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 200-201.

<sup>272</sup> I Currie & J De Waal *The bill of rights handbook* (6<sup>th</sup> ed 2013) 181.



generally be applied to vindicate all fundamental rights violations. Constitutional damages is specific and relief of the last resort that will only be considered appropriate when there is no other appropriate remedy (indirect or constitutional) available to vindicate the fundamental rights infringement in a just and equitable manner.

## 6 Conclusion

Regulatory state action that is otherwise lawful and legitimate but results in an unforeseen and unintended burden being imposed on one or a small number of property owners would normally be treated as an arbitrary and therefore unconstitutional deprivation of property in terms of section 25(1). In light of the courts' reluctance and the arguable improbability of recognising the notion of constructive expropriation the default remedy for arbitrary deprivations is generally a declaration of invalidity.<sup>273</sup> However, the particular arbitrary regulatory measure may in some instances serve a necessary and important public purpose that cannot be reasonably attained otherwise. In this regard, it would have an adverse impact on the public interest to invalidate the excessive regulatory measure but, at the same time, it would be unfair to force disproportionately affected property owners to tolerate excessively harsh burdens without receiving compensation for the benefit of society at large.

In chapter 3 an alternative to constructive expropriation is discussed. German, French, Dutch and Belgian law recognise the possibility of including a non-expropriatory equalisation compensation provision in the specific excessive regulatory statute. This non-expropriatory compensation would soften the

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<sup>273</sup> See chapter 2 for a discussion on constructive expropriation.

excessiveness of the regulatory burden and prevent the burden from being disproportionate and therefore unconstitutional. The German approach in this regard is strict, the excessive regulatory legislation has to specifically provide for non-expropriatory compensation and the statute must set out clearly and in detail when an individual property owner is entitled to such non-expropriatory compensation and how the amount of compensation should be calculated. The courts in French, Dutch and Belgian law, on the other hand, are allowed to award non-expropriatory compensation even in the absence of specific statutory authority.

In South African law there is legislation that does provide for non-expropriatory compensation, for example the Animal Diseases Act 35 of 1984, the National Water Act 36 of 1998 and the Local Government Ordinance 17 of 1939. The compensation in these statutes looks similar to the explicit compensation provisions in excessive regulatory statutes in German, French, Dutch and Belgian law. This type of non-expropriatory compensation provisions in these South African statutes fulfil a similar function as that in German, French, Dutch and Belgian law in the sense that they serve to equalise the harsh and excessive burden that may result from an excessive non-expropriatory regulatory measure and thereby prevent the burden from being disproportionate and unconstitutional and thereby subject to invalidity.

There are also statutes in South African law that explicitly exclude the possibility of compensation in specific instances, for example the Firearms Control Act 60 of 2000. In *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others*<sup>274</sup> the Supreme Court of Appeal held that it would be a deliberate disregard of the explicit provisions of the Act if the Court was to read compensation into the Act, which explicitly excludes the possibility of compensation.

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<sup>274</sup> [2012] ZASCA 190 (30 November 2012) para 17.

In this regard, it seems impossible for courts to interpret legislation that explicitly exclude compensation in line with section 39(2) of the Constitution by means of reading a compensation provision into the Act. Therefore, an approach similar to the French, Dutch and Belgian solution when the legislation does not provide for non-expropriatory compensation seems impossible in South African law. It seems that invalidity is inevitable in these circumstances. It is not clear whether the courts will be willing to resort to the constitutional remedy of constitutional damages in cases where the legislation explicitly excludes the possibility of compensation but the legislation imposes a disproportionate regulatory burden. The Constitutional Court is hesitant to award the remedy of constitutional damages and it has repeatedly held that it will only be willing to do so in exceptional cases where the facts of the case are extraordinary and there are no other remedies available, including invalidity, that will vindicate the fundamental right infringement in a just and effective manner.

In addition to South African legislation that provides for non-expropriatory compensation and legislation that explicitly excludes the possibility of compensation, there is legislation that does not provide for non-expropriatory compensation and may have the potential of imposing an excessive regulatory burden that may be arbitrary and unconstitutional. Examples include the Electronic Communications Act 36 of 2005, the National Heritage Act 25 of 1999 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. In this regard, it is argued that the legislation should be amended to provide for non-expropriatory compensation that is aimed at reducing the regulatory burden and preventing the burden that results from the application of the statute from being disproportionate and arbitrary and therefore rendering the specific legislation subject to invalidity. In the absence of such compensatory provision, it is not clear whether the courts will interpret the legislation in line with the Constitution in terms of section 39(2) by

means of reading-in a compensation provision. The remedy of reading-in such compensation seems impossible if the statute explicitly excludes the possibility of compensation and is also unlikely if the intention of the legislature, although not expressly stated, seems to indicate that compensation should not be applicable.<sup>275</sup> However, the decision in *M and Another v Minister of Police*,<sup>276</sup> although only a high court decision, might be an indication that the courts will read the legislation in a manner that allows compensation if the legislation may be in conflict with the Constitution for sufficiently protecting fundamental rights and there is nothing in the legislation to indicate that the legislature did not intend the payment of compensation.

The last possibility to save excessive regulatory measures from invalidity is by awarding constitutional damages. However, this does not seem to be a reliable and appropriate alternative remedy to invalidity since it is very specific and a claim for constitutional damages rarely succeeds. The Constitutional Court is reluctant to award constitutional damages as it will breach the separation of powers principle if it was readily awarded as a cure-all solution. The cases in which constitutional damages were awarded concerned exceptional and extraordinary circumstances and there were no other alternative remedies available to cure the fundamental rights violation that had occurred.

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<sup>275</sup> See for example *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 3.

<sup>276</sup> 2013 (5) SA 622 (GNP).

## Chapter 5

### Conclusion

Section 25 of the South African Constitution authorises the state to limit property rights by means of either deprivation or expropriation and simultaneously sets the limits to which the state may legitimately limit property rights. Section 25(1) requires that any regulatory deprivation of property rights must be authorised by law of general application and that no law may authorise arbitrary deprivation of property. In addition to the requirements in section 25(1), section 25(2) requires that expropriation of property must be for a public purpose or in the public interest and must be accompanied by just and equitable compensation.

The focus of this study is the requirement in section 25(1) that no law may authorise arbitrary deprivation of property. In terms of the *FNB* arbitrariness test, a deprivation is arbitrary if there is no sufficient reason for the deprivation. The question whether there is sufficient reason for deprivation requires a consideration of a complexity of relationships.<sup>1</sup> In the end, whether deprivation is substantively arbitrary or not is dependent on the level of scrutiny a court decides to apply to a particular case and may range from a lower rationality review to a stricter proportionality review.

Courts will generally find deprivations of property that impose a harsh and excessive burden on an individual or small group of property owners arbitrary and unconstitutional, for which the default remedy is usually invalidity. However, in chapter 1 it is stated that invalidity may not always be the appropriate remedy,

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<sup>1</sup> See the discussion on the establishment of sufficient reason in chapter 1.

especially in cases where the regulatory deprivation complies with all the formal requirements of section 25(1) (the regulatory measure is therefore otherwise legitimate and lawful in the sense of being authorised by law of general application, complies with procedural requirements and serve a necessary and important public purpose) but results in an excessive and harsh regulatory burden for one or a small group of property owners. In these circumstances, although the disproportionality of the burden alone may not always justify the invalidity of the regulatory measure, it cannot be expected of the affected property owner to endure the excessive and harsh burden without compensation either. Furthermore, it may not be in the public interest to invalidate otherwise legitimate and lawful regulatory measures that fulfil an important and necessary public purpose merely because the burden that results from the application of the regulatory statute may sometimes be excessive and unfair for one or a small group of property owners. If legislation that is aimed at protecting the public from, for example, water damage that may result from a raise in the water levels of a specific dam, authorises the state to increase the height of the dam wall were invalidated because of the excessiveness of the burden on the small number of adjacent property owners (whose property value may decrease as a result of a loss of their property's view over the dam, or loss of light on the property) might have disastrous consequences for public safety. The same is true for the invalidation of legislation that is enacted to give effect to specific fundamental rights in the Bill of Rights. An example is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) that is enacted to give effect to property rights in section 25 and housing rights in section 26 of the Constitution. In some situations PIE may impose a burden that is excessive and disproportionate on an individual private property owner whose property is unlawfully occupied. If PIE were to be invalidated for authorising arbitrary deprivation of property, it would create a

void in eviction law and have dire consequences for the rights of unlawful occupiers. In addition, a declaration of invalidity may in some situations be meaningless and would not constitute appropriate relief as meant by section 38 of the Constitution.<sup>2</sup> Therefore, it is necessary to find alternative ways to save these otherwise lawful and legitimate regulatory measures from invalidity.

There are various alternative solutions to invalidity developed in foreign law that may serve as examples to overcome the problem in South African law. These alternative solutions allow courts to uphold excessive regulatory measures that are otherwise legitimate and lawful but impose a disproportionate burden on an individual or select group of property owners, by awarding compensation. Such a compensation award could be made on the basis of different strategies.

The notion of constructive expropriation or regulatory taking discussed in chapter 2 is one strategy that would allow courts to uphold excessive regulatory measures by awarding compensation to the adversely affected property owner.<sup>3</sup> In terms of the notion of constructive expropriation, courts judicially transform excessive regulatory measures that have the same effects as expropriation, although there is usually no state acquisition of the property, into expropriation and require the payment of compensation even though the state did not formally expropriate the affected property owner. The notion of constructive expropriation is influenced by the doctrine of regulatory takings that originated in the US Supreme Court. The Fifth Amendment to the US Constitution refers to “taking” of property. The term “taking” is wider than expropriation, as it also includes some regulatory state actions that are

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<sup>2</sup> See for example *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC). See also the discussion of PIE in chapter 4.

<sup>3</sup> The use of the terms “constructive expropriation” and “regulation taking” are dependent on whether one is dealing with a common law or civil law legal tradition. See the discussion on the difference in terminology in chapter 2.



tantamount to expropriation but do not constitute formal expropriation of property, called regulatory takings. Regulatory takings of property cannot be upheld without the payment of compensation. Similar to the US notion of regulatory takings, Irish law also recognises the validity of excessive regulatory measures provided that they are accompanied by compensation. The Irish Constitution does not distinguish between deprivation and expropriation of property and the duty to pay compensation is not limited to expropriation in the narrow sense of a formal compulsory acquisition of the affected property by the state. In the absence of state acquisition, it is a matter of degree whether compensation is required. If a regulatory interference with property imposes a harsh and excessive burden on one or a small group of property owners, the interference constitutes an unjust attack on property if such regulatory interference is not accompanied by the payment of compensation. Similar to the term “taking” in the US Constitution, the term “unjust attack” in the Irish Constitution extends beyond formal expropriation of property and includes otherwise lawful and legitimate but excessive regulatory interferences with property rights. Unlike the judicial transformation of excessive regulatory measures into expropriation that require compensation in US and Irish law, the Swiss Constitution explicitly recognises a third category of state interferences with property, namely material expropriation. The types of excessive regulatory interferences discussed in chapter 1 are generally classified as material expropriation in Swiss law. Similar to regulatory takings, compensation is a validity requirement for material expropriation.

The notion of constructive expropriation is one alternative solution to the invalidation of otherwise legitimate and lawful but excessive regulatory deprivations of property. However, chapter 2 concludes that the notion of constructive expropriation might be inappropriate, if not impossible, in South African law. Despite the criticism of the courts’ conflicting theories on how to determine whether a

regulatory interference with property rights constitutes a regulatory taking or an unjust attack in US and Irish law, which in itself illustrates that constructive expropriation creates legal uncertainty and might not be the best solution, the structure and terminology of the US, Irish and Swiss constitutions are unique and create the necessary context for the application of the doctrine of constructive expropriation. Section 25 of the South African Constitution, on the other hand, draws an explicit distinction between deprivation and expropriation of property. In terms of the *FNB* methodology, expropriation is a subset of deprivation. Roux argues that the *FNB* methodology negates the possibility of recognising the notion of constructive expropriation since excessive regulatory deprivations of property would have failed the arbitrariness test before they reach the expropriation stage of the analysis.<sup>4</sup> Furthermore, in *Agri SA*<sup>5</sup> the Constitutional Court stated that state acquisition of the affected property is a necessary requirement for the establishment of expropriation. In addition to the conceptual hurdle created by the *FNB* methodology, the requirement of state acquisition as a fixed requirement for expropriation also negates the possibility of recognising the notion of constructive expropriation since the type of excessive regulatory deprivations of property that would generally fall within the category of constructive expropriation do not involve state acquisition of property at all. In addition to these difficulties, South African courts are generally reluctant to recognise constructive expropriation. However, there are alternative solutions to constructive expropriation that would allow courts to uphold excessive regulatory measures without transforming the deprivation into expropriation. Therefore, it is not

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<sup>4</sup> T Roux "Property" in S Woolman; T Roux & M Bishop (eds) *Constitutional Law of South Africa* Vol 3 (2<sup>nd</sup> ed OS 2003) chap 46 at 3; T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 265-281 at 270. See also the discussion in chapter 2.

<sup>5</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

necessary for South African law to develop the notion of constructive expropriation of property.

Chapter 3 reviews the German, French, Dutch and Belgian solution to save otherwise legitimate and lawful regulatory measures from invalidity because they authorise the state to impose a disproportionate burden on individual or small groups of property owners. These four jurisdictions recognise that the payment of non-expropriatory compensation in instances where the regulatory statute authorises the state to impose harsh and excessive regulatory burdens on individual property owners could equalise the burden and prevent the statute from being disproportionate and consequently invalid.

The possibility of recognising something similar to constructive expropriation was considered in German law by the civil, administrative and constitutional courts. However, in the *Naßauskiesung* decision the Federal Constitutional Court explicitly rejected the notion of constructive expropriation.<sup>6</sup> The Federal Constitutional Court held that excessive regulatory measures are invalid and cannot be upheld by the judicial award of compensation. However, the Federal Constitutional Court mentioned that invalidity might not always be justified but it cannot be expected of property owners to bear the excessive and disproportionate burden without compensation either. Subsequently, in the *Denkmalschutz* decision the Federal Constitutional Court recognised that compensation may sometimes equalise the excessiveness of the burden and thereby prevent the statute from authorising a disproportionate regulatory interference with property rights in conflict with the Basic Law.<sup>7</sup> However, the Federal Constitutional Court held that this equalisation solution is only allowed in exceptional circumstances. Non-monetary equalisation measures,

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<sup>6</sup> BVerfGE 58, 300 (1981). See the discussion of this decision in chapter 3.

<sup>7</sup> BVerfGE 100, 226 (1999). See the discussion of this decision in chapter 3.

such as transitional measures, exceptions and exemptions, are preferable to monetary equalisation measures. Furthermore, there must be an explicit statutory basis for the payment of compensation and the statute must state clearly when a property owner will be entitled to claim compensation and how the amount of compensation should be calculated. A vague, catch-all compensation provision will not be sufficient. This form of compensation is non-expropriatory since no expropriation of property occurred. The German solution to excessive regulatory measures is therefore strict. If the regulatory statute does not provide for compensation, courts are not allowed to uphold the excessive regulatory measure on the condition that compensation should be paid. The only remedy in these circumstances is to declare the excessive regulatory statute invalid.

French, Dutch and Belgian law also recognise the possibility of explicit statutory provision for non-expropriatory compensation in instances where the regulatory burden is otherwise lawful and legitimate but authorises the disproportionate limitation of property rights of an individual or a small group of property owners. However, unlike German law, an explicit statutory basis for this form of non-expropriatory compensation is not a pre-requisite. Furthermore, the form of compensation is generally monetary. French, Dutch and Belgian courts may award non-expropriatory compensation even in the absence of explicit statutory authorisation on the basis of the *égalité* principle.<sup>8</sup> The *égalité* principle developed in French law and was transferred to Dutch and Belgian law. In terms of the *égalité* principle, compensation is required when the burden that results from the excessive regulatory statute is both special and abnormal. A regulatory burden is special when it only affects an individual or a small group of property owners in comparison to similarly situated property owners. Furthermore, a burden is abnormal when the loss

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<sup>8</sup> See the discussion of the *égalité* principle in French, Dutch and Belgian law in chapter 3.

that results from the regulatory measure is so excessive that it cannot be expected of the affected owner of the property to endure the burden without compensation.<sup>9</sup> Although both requirements must be met before a duty to pay compensation in terms of the *égalité* principle arises, the special burden requirement receives less attention in Dutch law than in its French counterpart.

The role played by the *égalité* principle is not the same in French, Dutch and Belgian law. In French law, the *égalité* principle forms one of two bases for holding the state liable for lawful state action. The legal foundation for awarding non-expropriatory compensation for lawful state action (also called *nadeelcompensatie*) is unclear in Dutch law. However, the general consensus in Dutch law is that the *égalité* principle forms the independent legal foundation for *nadeelcompensatie*. Furthermore, in Belgian law the *égalité* principle forms one basis of awarding non-expropriatory compensation for otherwise lawful and legitimate but excessive regulatory measures. There is no uniform treatment of excessive regulatory measures by the Belgian courts. The judicial award of non-expropriatory compensation (in the absence of explicit statutory authorisation) in terms of the *égalité* principle fulfils the same function as monetary equalisation measures in German law. The compensation is non-expropriatory in nature and is aimed at softening the excessive burden on the affected property owner.

The German, French, Dutch and Belgian solution of including a non-expropriatory compensation provision in specific legislation that foresees the possibility that the statute may impose a harsh and excessive burden on one or a small group of property owners in some situations is not foreign to South African law. An overview of statutory examples that make provision for this form of non-expropriatory equalisation-type compensation is discussed in chapter 4. The

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<sup>9</sup> See the discussion in chapter 3 of the special and abnormal requirements of the *égalité* principle.

legislation discussed there is not a complete overview of South African legislation but selected on the basis of examples that were considered by the courts. Examples of legislation that do provide for non-expropriatory compensation include the Animal Diseases Act 35 of 1984, the National Water Act 36 of 1998 and the Local Government Ordinance 17 of 1939. The provision for compensation in these statutes fulfil a similar equalisation function as the non-expropriatory compensation provisions in German, French, Dutch and Belgian statutes. Therefore, the compensation provision is aimed at softening the regulatory burden that may arise from the application of excessive regulatory legislation and thereby prevent the burden from being disproportionate and unconstitutional and therefore subject to invalidity. As appears from the discussion, it is not customary for South African statutes of this kind to specify the basis on which compensation must be calculated in the same detail as is required in German law, although some provisions of this kind do appear.

In chapter 4, South African legislation is identified that does not but should arguably be amended to provide for non-expropriatory compensation. Examples of such legislation include the Electronic Communications Act 36 of 2005, the National Heritage Act 25 of 1999 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The application of these legislative examples may impose a burden that may in some situations be arbitrary and in conflict with section 25(1) of the Constitution. In these circumstances, they may be subject to invalidity. Furthermore, South African legislation that explicitly excludes the possibility of compensation is also identified in chapter 4. An example of such legislation is the Firearms Control Act 60 of 2000.

Section 39(2) of the South African Constitution mandates the courts to interpret legislation in a manner that will bring the legislation in line with the Constitution. The question arises whether the courts may read in a compensation provision in the

otherwise lawful and legitimate but excessive regulatory statute that does not provide for compensation or that explicitly excludes the possibility of compensation. In *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others*<sup>10</sup> the Supreme Court of Appeal made it clear that it cannot read a provision into the statute that explicitly excludes compensation for specific instances in a manner that would allow the payment of compensation in those excluded instances. The Supreme Court of Appeal held that this would unduly strain the language of the legislation and be a deliberate disregard of the express wishes of the legislature.<sup>11</sup> Moreover, if the legislation does not explicitly exclude the possibility of compensation but the legislation somehow indicates that it is the intention of the legislature that compensation should not be payable, the courts will not read in a provision for compensation into the statute.<sup>12</sup> Therefore, the remedy of reading-in a compensation provision seems impossible if the legislation explicitly excludes the possibility of compensation or if there is something in the legislation that indicates that it could not have been the intention of the legislature to allow the payment of compensation.

In *M and Another v Minister of Police*<sup>13</sup> the North Gauteng High Court interpreted the legislation to allow for the payment of compensation. The decision concerned the interpretation of section 15 of the Children's Act 38 of 2005, which merely authorised the court to award appropriate relief to a claimant whose rights in the Bill of Rights have been infringed. The legislature did not expressly exclude the possibility of compensation or indicate that compensation should not be allowed. Therefore, this decision might be an indication that the courts will interpret legislation

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<sup>10</sup> [2012] ZASCA 190 (30 November 2012).

<sup>11</sup> *Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others* [2012] ZASCA 190 (30 November 2012) para 17. See also the discussion in chapter 4.

<sup>12</sup> See for example *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 3.

<sup>13</sup> 2013 (5) SA 622 (GNP).



in terms of section 39(2) of the Constitution to allow for the payment of compensation if this remedy will promote the spirit, purport and objects of the Bill of Rights and there is nothing in the legislation to explicitly or implicitly indicate that compensation should not be awarded. If this interpretation of the decision is correct, it may be an indication that the South African approach to non-expropriatory compensation measures is not as strict as the German approach. It seems that South African law will regard vague, catch-all provisions as sufficient.

If an otherwise legitimate and lawful but excessive regulatory statute does not provide for non-expropriatory compensation and compensation cannot be read into the statute in terms of section 39(2) of the Constitution, or if compensation is explicitly excluded, the question arises whether the courts can award a constitutional remedy in the form of constitutional damages in terms of section 38 read with section 172(1)(b) of the Constitution to reduce the regulatory burden and prevent the burden from being arbitrary and therefore subject to invalidity. The Constitutional Court has repeatedly held that constitutional damages is a specific remedy that is only applicable in exceptional circumstances.<sup>14</sup> The Constitutional Court is generally hesitant to award constitutional damages because it may easily breach the delicate separation of powers principle that underlies the Constitution. The rare cases in which constitutional damages were awarded was when the facts of the case were extraordinary and there was no other appropriate remedy available that would have vindicated the fundamental rights infringement in a just and effective manner.

In conclusion, the remedy of constitutional damages does not seem to be a reliable or appropriate last-resort remedy to salvage excessive regulatory measures, because constitutional damages may only be considered in very strictly circumscribed and exceptional circumstances. Furthermore, a claim for constitutional

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<sup>14</sup> See the discussion of constitutional damages in chapter 4.

damages rarely succeeds. It seems unlikely, if not impossible, that the notion of constructive expropriation could be developed in South African law. The courts will not read-in a compensation provision if the statute explicitly excludes the possibility of compensation or if the legislation somehow indicates that compensation should not be awarded. The Supreme Court of Appeal or the Constitutional Court has yet to decide whether courts may read-in a compensation provision into legislation where the legislature does not explicitly exclude compensation or indicate that compensation should not be awarded. Therefore, invalidity of the excessive regulatory statute is inevitable unless the legislature explicitly provides for non-expropriatory compensation in the particular legislation or if such a provision can reasonably be read into the provision.

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